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In the Supreme Court of the United States

FLORENCE E. MANNEL
Petitioner,

v

INDUSTRIAL COMMISSION OF ARIZONA
Respondent,

DEPARTMENT OF TRANSPORTATION
Respondent Employer,

STATE COMPENSATION FUND
Respondent Carrier,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE

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QUESTION PRESENTED

Whether Arizona Revised Statute Title 23, Section 1023, herein cited as A.R.S. Section 23-1023, as interpreted by the Court of Appeals of the State of Arizona, Division One, in *Mannel v. Industrial Commission of Arizona, et al.,* is a taking by the State of Arizona of Petitioner's private property for public use without just compensation.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE

FLORENCE E. MANNEL, by and through her attorney, Bernard I. Rabinovitz, petitions herein for a Writ of Certiorari to review the Decision of the Court of Appeals of the State of Arizona, Division One, which affirmed the Decision, Findings, and Award of the Industrial Commission of Arizona and amounted to a taking of Petitioner's property without just compensation.

OPINION BELOW

The Opinion of the Court of Appeals of the State of Arizona, Division One, filed May 17, 1984, affirming the Decision, Findings, and Award of the Industrial Commission of Arizona is reprinted in full as Appendix A.

JURISDICTION

The Opinion and Order appealed from was filed May 17, 1984. The Order of the Supreme Court of Arizona denying Petition for Review was made on September 13, 1984. The Order of the Supreme Court of Arizona denying Petitioner's Motion for Permission to File Motion to Reconsider was filed October 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA STATUTORY PROVISION INVOLVED

A.R.S. Section 23-1023, provides:

"A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

STATEMENT OF THE CASE

On September 21, 1978, Howard Mannel, decedent herein, sustained an industrial injury. The employer was insured under the provision of the Arizona Workmen's Compensation Act against liability for the payment of medical, surgical, hospital and/or compensation benefits. The decedent's claim was accepted and benefits paid by the Arizona State Compensation Fund until approximately July, 1981, at which time the decedent and FLORENCE MANNEL, herein the Petitioner, entered into an agreement to compromise and settle a third party claim, which arose out of the subject industrial episode for the sum of $160,000.00. The insurance carrier approved the settlement and received the sum of $24,655.57 in complete payment of its claimed lien to that point and asserted a credit against the payment of any further compensation, medical, surgical and hospital benefits.

On April 16, 1982, the decedent died suddenly in a barber's chair. At the time of his death there was a credit against further compensation still being asserted by the Respondent, in the sum of approximately $79,000.00. On May 14, 1982, the Petitioner filed a claim for widow's death benefits. On June 4, 1982, the Respondent Insurance Carrier denied the Petitioner's claim. Formal hearings were held in Tucson, Arizona, on January 3, 28 and February 7, 1983, before the Industrial Commission of Arizona. The preponderance of the evidence established that the demise of the decedent was within a reasonable degree of medical probability, caused by the industrial episode and resultant injury. The Administrative Law Judge awarded burial expenses and widow's death benefits as set out in the death benefits statute; however, said Award was subjected to a *new* credit or lien of $79,000.00. In essence the unused portion of the decedent's lien would prevent the widow from receiving any benefits for some fifteen years.

Petitioner filed a special action Petition to Review the Award before the State of Arizona, Court of Appeals, Division One. Wherein the issue was whether present death benefits that had not matured when the employee's third party action against the tort-feasor was settled are subject to the unsatisfied portion of the credit. The Court held that the widow's benefits are subject to said credit and therefore affirmed the award.

By the interpretation of the Court of Appeals of the State of Arizona, Division One, of the Arizona Revised Statute Section 23-1023 in *Mannel v. Industrial Commission of Arizona, et al.*, the State of Arizona has taken Petitioner's property without just compensation.

The Supreme Court of the State of Arizona refused to take review of said decision as indicated above.

REASONS FOR GRANTING THE WRIT

The Decision below creates a lien in a statute where none exists. As a practical matter, Petitioner will have to wait some fifteen years before starting to receive benefits to which she was found entitled in 1984. This Decision allows the State of Arizona through its Industrial Commission, to take private property, an independent statutory right to widow's death benefits, for public use without compensation. To adequately assess this charge against the State, the statutory scheme must first be examined.

A.R.S. Section 23-1021 defines the right of the employee to compensation. Distinct from that right is the widow's and dependent's right to death benefits set forth in A.R.S. Section 23-1046. (See Appendix E.) By its own edict, below, the Arizona Court of Appeals stated that,

> "...[death benefits]...are an independent statutory right that do not derive from the decedent. A worker's compromise of his rights to worker's compensation medical expenses and disability benefits does not affect the rights of

his dependent's death benefits. See, e.g. *Kay v. Hillside Mines, Inc.*, 54 Ariz. 36, 91 P. 2d 867 (1939); *accord* 2A Larson, [Workmen's Compensation Law], Section 64." *Mannel v. Industrial Commission of Arizona, et. al.*, slip op., page 8 (see Appendix).

Given the existence of two statutory rights, a detailed analysis and comparison of the language of the individual subsections of A.R.S. Section 23-1023 illustrates that no lien was intended to attach to the widow's workers compensation death benefits because of the third party claim recovery based on the employee's injuries.

Subsection (A) of A.R.S. Section 23-1023 allows the employee to pursue *his* (the employee's) remedy against the wrong of a third party or alternatively, in the event of the employee's death, *his* (the employee's) dependents may pursue *his* remedy against the third party. The employee pursuing his own remedy would be a personal cause of action, while the dependents pursuing the employee's remedy would be on a survival theory and not a theory of wrongful death. (Emphasis supplied.)

Subsection (B) of A.R.S. Section 23-1023 sets out the time limitations for filing third party claims without obtaining a reassignment of the claims from the carrier or person liable. The language *"his or their remedy"* in this subsection when compared with Subsection (A) can only mean that the employee may bring *"his"* personal action; his dependents, should he die, may bring *"his"* (the employee's) survival action, and the dependents may also bring *"their"* wrongful death actions. (Emphasis and parentheticals supplied.)

Finally, Subsection (C) of A.R.S. Section 23-1023, which creates the lien, uses both the language *"he"* and "the employee or *his* dependents." For this subsection to make logical sense and agree with Subsections (A) and (B), the following meanings must attach. With respect to the "compromise of any claims" clause of Subsection (C), "the employee or his dependents" can refer to

compromise of any third party claim, be it a personal, survival, or wrongful death cause of action.

The critical clause of A.R.S. Section 23-1023 which sets out the lien against third party recovery uses the word "he". Clearly, "he" can only be the employee, and therefore, the lien can only attach to the employee's rights.

Throughout all of A.R.S. Section 23-1023 the use of male gender pronouns indicates specifically the employee. Similarly, the use of the plural pronoun "their" indicates someone other than the employee; specifically, dependents. We agree with the Court, below, wholeheartedly when it said that these subsections concern the same subject and they therefore should be interpreted as a whole. *Talley v. Industrial Commission of Arizona,* ICA-IC 2809), _____ , Ariz. _____ , _____ P. 2d _____ (Ariz. App., August 16, 1983).

This is the only lien provision in the Arizona statutory scheme. There is no corresponding lien which applies to the independent statutory right of dependents' benefits. The Arizona courts have held time and again with respect to the Worker's Compensation Act that if something is not in the statute, like a lien on dependent's benefits, then it is simply not there!

The right conferred upon injured workmen by [the Act] being purely statutory, cannot be extended beyond the terms of the statute creating it. A.R.S. Section 23-101 et seq. *Sorenson v. Six Companies,* 53 Ariz. 83, P. 2d 980 (1939).

[The Act] is purely statutory in its origin, and benefits thereunder can be granted only when provided by statute. A.R.S. Section 23-101 et. seq. *Kay v. Hillside Mines,* 91 P. 2d 867, 54 Ariz. 36 (1939). The rights acquired under [the Act] are purely statutory and one claiming compensation must bring himself within the terms of the act. A.R.S. Section 23-101 et seq. *Danner v. Industrial Commission,* 95 P. 2d 53, 54 Ariz. 275 (1939). The right to compensation is purely statutory in nature, and resort

must be made to the statute to determine its extent and limitations. A.R.S. Section 23-101 et seq. *Paramount Pictures v. Industrial Commission,* 106 P. 2d 1024, 56 Ariz. 217, 352 (1940). Rights under workmen's compensation laws are completely statutory and arguments concerning the inadequacy of worker's compensation benefits as opposed to being allowed to recover damages in the Superior Court from his self-insured employer and its agent were *best addressed to the legislature. —Sandoval v. Salt River Project Agricultural Improvement and Power Dist.,* 571 P. 2d 706, 117 Ariz. 209 (App. 1977). (Emphasis supplied.)

Clearly the Legislature was choosing its words very, very carefully to express its true intent. This intent to not include death benefits within the lien clause is also exhibited in the State Constitution, the spirit and intent of the Arizona Workmen's Compensation Statutes, and authorities from other jurisdictions.

By applying the decedent's lien to the Petitioner's claim, the State of Arizona has essentially eliminated the widow's constitutionally guaranteed right to compensation benefits. *Article 18 Section 8 of the Arizona Constitution* provides for benefits should death be caused to a worker by injury arising out of and in the course of his employment and commands that this right be left intact:

> "... and provided further in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor, ..."
>
> "The percentages and amounts of compensation provided in House Bill No. 227 enacted by the Seventh Legislature of the State of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227

eliminated except by initiated or referred measure as provided by this Constitution."

Article 18, Section 8 of the Arizona Constitution.

It is the position of the Petitioner herein that by imposing the lien pertaining to her husband's personal injury settlement upon her claim for widow's death benefits, she is effectively being denied the compensation benefits guaranteed to her by this constitutional provision. This, of course, would be a state issue and this point is made only to illustrate the intent of A.R.S. Section 23-1023.

The spirit and intent of the Arizona Workmen's Compensation Act, A.R.S. Section 23-901, et seq. of which A.R.S. Section 23-1023 is a part, has always been held by the Arizona Courts to require a liberal construction in favor of the worker and/or his dependents as follows: [The Act] should be given a liberal construction with a view to effectuating the principle of placing the burden of death and injury on industry. *Pottinger V. Industrial Commission,* 22 Ariz. App. 389, 527 P. 2d 1232 (1974); *Peter Keweit & Sons's Co. v Industrial Commission,* 88 Ariz. 164, 354 P. 2d 28 (1960); *Hannon v. Industrial Commission,* 9 Ariz. App. 231, 451 P. 2d 44 (1969). The public policy under [the Act] has been *first* to protect the employee... and *second* to protect the Compensation Fund... *State ex. rel. Industrial Commission v. Pressley,* 74 Ariz. 412, 250 P. 2d 992 (1952) (Emphasis supplied). [The Act] serves the economic and social welfare purposes of preventing claimants and their dependents from becoming public charges during the period of disability. *Jalifi v. Industrial Commission of Arizona,* 132 Ariz 233, 644 P. 2d 1319, (App. 1982), Appeal dismissed 103 S. Ct. 200. Finally, [the Act] affords the exclusive remedy for dependents against decedent's employer and insurance carrier. *Rios v. Industrial Commission,* 120 Ariz. 374, 586 P. 2d 219 (App. 1978). Petitioner agrees with the Court below when it said that the terms of Section 23-1023 are determinative as opposed to out-of-state authority. *Mannel v. Industrial Commission of Arizona,* see Appendix. However, when the State and its Courts are unable to derive the true meaning and

intent of the statute then these secondary authorities may be useful to this Honorable Court in determining whether there is a right, which was intended by the legislature, being taken away for public use without just compensation.

Transcontinental Insurance Co. v. Walsh, 621 S.W.2d. 461, Tex. App. 1981, is factually in point with the instant case, and although the Texas statute is worded differently, the overall effect is the same as A.R.S. Section 23-1023 C.

In this decision the settlement of the husband's third party lawsuit even included $100,000 specifically for damages sustained by the widow. The carrier in that case was claiming an entitlement to offset the net recovery in the third party action against the widow's claim for death benefits. The statute in question in Texas involves Section 6(A) of Article 8307, Vernon's Tex. Civ. St.:

> "If at the conclusion of a third party action a workman's compensation beneficiary is entitled to compensation, the net amount recovered by such beneficiary from the third party action shall be applied to reimburse the association for past benefits and medical expenses paid and any amount in excess of past benefits and medical benefits shall be treated as an advance against future benefit payments of compensation to which the beneficiary is entitled to receive under the Act. When the advance is adequate to cover all future compensation and medical benefit payments as provided by this law, no further payment shall be made by the association but if insufficient, the association shall resume such payments when the advance is exhausted...."

In finding an entitlement to death benefits the Texas Court of Civil Appeals held as follows:

> "We do not agree with defendants construction of the statute. Rather, we agree with plaintiff that she was not a 'workman's compensation beneficiary entitled to benefits'

at the conclusion of the third party action, required for application of the statute.

"Under our worker's compensation statutes, where death results from a compensable injury a new cause of action for death benefits arises and vests in the legal beneficiaries of the decedent. 'This cause of action [for death benefits] is separate and distinct from the cause of action for compensation belonging to the injured employee during his life and which will, upon his death, vest in his legal beneficiaries the right to claim all compensation payments which had accrued at the time of his death but had not been paid." *American Motorists Insurance Co. v. Villa Gomez,* 398 S.W. 2d 742, 744 (Tex. 1966)

"They are so distinct that the employee can, by no act or deed, release or affect the cause of action [for death benefits] belonging to the legal beneficiaries." *Traders and General Insurance Co. v. Baldwin,* 125 Tex. 577, 84 S.W. 2d 439 (1935).

In our case, Plaintiff was not 'at the conclusion of [the] third party action a workman's compensation beneficiary [who was] entitled to compensation,' whithin the application of the statute. Mr. Walsh was the beneficiary at that time. It was only after Mr. Walsh's death that plaintiff became a beneficiary under the worker's compensation statutes.

Any other result would impose a lien upon a non-recipient of Workman's Compensation benefits for injuries received by the decedent which are noncompensable under the widow's claim."

In *Roberts v. All American Engineering Company,* 248 Atl. 2d 280, 104 N.J. Super. 1 (1968), the Appellate Division of the Superior Court of New Jersey upheld the rights of a widow and dependents to compensation benefits and denied the imposition of a lien asserted by virtue of a third party recovery received by

the employee when he was still alive. The reasoning of this court is highly appropriate in the instant case as follows:

> "Since the widow and children had no legal rights in the fund created by the employee's third party action, the employer has no right to be subrogated to any part of this fund by way of reimbursement therefrom for any dependency payments made to the widow and children... Therefore, under the circumstances here present, we conclude that N.J.S.A. 34:15-40(b) does not release the employer or its insurance carrier from liability to the petitioner and her children for the dependency payments awarded to them by the trial court.
>
> This result does not effectuate a 'double recovery' rather it equitably carries out the purpose of N.J.S.A. 34:15-40 by 'martialing the rights and responsibilities of the several parties concerned in compensation payments where, in the course of his employment, injury or death comes to a workman as a result of the fault of a third party*** *United States Casualty Co. v. Hercules Powder Co.*, supra, 4 N.J. at page 165, 72 A. 2d at page 195. Moreover, this result assures the availability of an unimpaired fund for the relief of the surviving dependents of the employee, an obvious salutary objective of the Workman's Compensation Act..."

The New Jersey court then went on to cite with approval the New York decision of *Kresci v. Mike Krasilousky Trucking Co.*, 5 A.D. 2d 569, 172 N.Y.S. 2d 322 (App. Div. 1958) wherein the New York Superior Court denied a carrier the right to a credit against a dependent's claim as follows:

> "The rights of employers and carriers as respects recoveries against third parties are created and defined by Section 29 of the Workman's Compensation Law. We find therein no support for appellant's position. That section treats causes of action for personal injuries and those for death damages as separate remedies, as clearly they are, even when the same wrong gives rise to both (Decedent Estate Law Sections 119,

120, 130). The subrogatory and other rights conferred by Section 29 are there treated as similar separate and independent, as respects the separate causes of action to which they apply. 'Disability compensation and death benefits are distinct from each other and are entirely unrelated. Disability compensation is paid to an injured employee. Death benefits are for a decedent's dependents. Likewise the two causes of action, the one for wrongful death and the other for personal injuries, are separate and distinct. The former is for the loss resulting to the person's pecuniarly damaged by his death; while the latter is for the tortious injury to the person or property of the deceased during his lifetime.' ****

The damages recovered by decedent were for his personal injuries, including such elements as pain and suffering which are not comprehended in payments by employers and carriers under the Workman's Compensation Law, and the settlement proceeds remaining after reimbursement of the compensation received were his to do with as he pleased. See *Hitt v. Cardillo,* 76 U.S. App.B.C. 334, 131 F. 2d 233, Certiorari denied 318 U.S. 770, 63 S. Ct. 760, 87 L. Ed. 1140. That some part of the proceeds reached the hands of his dependents, by gift and by inheritance, is of no moment. It may be worthy of remark that appellant's claim as a credit against the award only the unexpended proceeds and would thus penalize such dependents as these, who with decedent chose to conserve, rather than to dissipate the monies received.

Accord, *Schwabacher v. International Salt Co.,* 272 App. Div. 173, 70 N.Y.S. 2d 370 (App. Div. 1947) affirmed 298 N.Y. 726, 83 N.E. 2d 140 (Ct. App. 1948); see also *Laird v. State of Vermont Highway Dept.*, 112 Vt. 67, 20 A. 2d 555, 562 (Sup. Ct. 1941)."

In accord with the foregoing decision is the recent New Jersey case of *Brumfield v. Gallo Wine Sales of New Jersey, Inc.*, N.J. Super. A.D. 443 A. 2d 731 (1982). Here the Superior Court

quoted with approval the decision of the County Court wherein it was held that:

> "It is inconceivable that the legislature had ever intended under these circumstances, that such an obligation should be transferred from a respondent and visited and imposed upon dependent children to the extent of reducing and depriving them of their benefits, which they are entitled to have and receive by virtue of the statute. For unless the statute directly provides for a deduction from compensation already awarded, such mandate may not be inferred, and therefore, none may be ordered."

In considering all of the legal authorities on the subject it is clear that those jurisdictions which have specifically addressed the factual situation present in the instant case, have all found in favor of the receipt of death benefits under the Workman's Compensation Act, and the inequity,if there be such, is placed upon the employer under the obvious spirit and intent of the Workman's Compensation Act.

Given the intent of the Arizona Workmen's Compensation Act, it is clear that the independent statutory right, a *res* held by the Petitioner, was taken by the State of Arizona for public use, the secondary purpose of funding the public insurance carrier (the State Compensation Fund), without just compensation. The focus now shifts to whether this taking was unconstitutional.

For centuries legal scholars have believed that the state possesses the power to take or destroy property for the benefit of the social unit, but they also believe that when the state acts in that way, it is obligated to compensate the injured property owner for his losses. See *Grotius, De Jure Belliet Pacis Lib.* III C. 20 VII 1 (1625); *Blackstone, 1 Blackstone's Commentaries* 137 (Chitty Ed. 1829). The just compensation clause of the Fifth Amendment to the Constitution was built upon this concept of a moral obligation to pay for governmental interference with private property. In the first half of the Nineteenth Century state courts applied this theory

of moral obligation or natural law to protect private property interests from state appropriations. See, e.g. *Gardner v. Village of Newburgh,* 2 Johns. Chapter 162 (N.Y. 1816) State constitutions now almost universally require that landowners be compensated when their property is taken by the state for a public use. Unlike the federal government, the state governments are not, for purposes of the Federal Constitution, creatures of limited or enumerated powers. When examining a state exercise of eminent domain, therefore, it is not necessary to determine whether the exercise of the power is necessary and incidental to the exercise of an express power. This exercise of power will be valid so long as it does not violate any provision of the *Constitution* or its amendments.

In 1868 the Fourteenth Amendment was made part of the Federal Constitution; its due process clause specifically protecting property rights. The Fourteenth Amendment, however, does not expressly require either that state "takings" of private property be for a public use or that the property owner receive just compensation for the loss. In 1897, in *Chicago, Burlington, and Quincy Railroad Company v. City of Chicago,* infra, this Honorable Court, in an opinion by the elder Justice Harlan held that due process required both that the property be taken for a public use and that the owner of the property be compensated by the state for his loss. *Chicago, Burlington, and Quincy Railroad Company v. City of Chicago,* 166 U.S. 226 (1897). Today, the Supreme Court cites that decision as incorporating the compensation clause into the Fourteenth Amendment and applicable to state action. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 159 (1980).

Given that the taking clause applies to state action, the issue then becomes, as it does in many eminent domain cases, does the governmental interference amount to a "taking"? As applied to the case at bar, the issue is whether the State of Arizona's acts through the Industrial Commission of Arizona extending the lien against an employee's widow to death benefits, constitutes such a taking.

Although the concept of a taking may originally have contemplated only physical appropriation, it is plain today that non-acquisitive governmental action may amount to a taking in a constitutional sense. See e.g., *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922); *United States v. Causby,* 328 U.S. 256 (1946); *Lenoir v. Porter's Creek Water Shed District,* 586 F. 2d 1081, 1093 (6th Cir., 1978). Further, the state possesses the power to regulate property without payment of compensation; however, if the regulation goes too far, a taking may also be found. *Pumpelli v. Green Bay Company,* 80 U.S. (13 Wall.) 166, 179 through 180 (1871). The case at bar is a case of regulation of non-physical property.

In regulation cases, it has been held that,

> "When [regulation] reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal Company v. Mahon Company,* 260 U.S. 393, 413 (1922).

The court therein found that the extent of the regulation was so great as to constitute a taking. In the words of Justice Holmes:

> "to make it commercially impractical to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414.

In the case at bar, the effect of attaching the husband's lien to the widow's death benefits has the effect of delaying any compensation guaranteed by the independent statutory right until Petitioner has come very near to approaching the end of her life expectancy. The effect of the regulation is to all but deny the death benefits due her in their entirety. Clearly this would be at least a serious interruption in the use of the property and the equivalent of a taking analogous to that found in *Pumpelli v. Green Bay Company,* 80 U.S. (13 Wall.) 166 (1871).

Professor Michelman, in his generally applauded and accepted note on the "taking" area, has described four factors, any one of which is normally determinative in evaluating whether compensation is constitutionally due. They are: 1. Whether or not the public, government or one of its agents have physically used or occupied something belonging to the claimant. 2. The size of the harm sustained by the claimant or the degree to which his affected property has been devalued. 3. Whether the claimant's loss is or is not outweighted by the public's concomitant gain. 4. Whether the claimant has sustanied any loss apart from the restriction of his liberty to conduct some activity considered harmful to other people. *Michelman, Property, Utility, and Fairess:* Commentaries on the Ethical Foundations of "Just Compensation" Law, 80 Harvard Law Review 1165, (1967).

In the case at bar, clearly the first threee determinative factors apply; 1. The Industrial Commission's decision has caused the State Fund, a governmental entity, to occupy and use the benefits which belong to the Petitioner. 2 and 3. The Petitioner has sustained the total loss of the benefits and has been forced to incur the total burden of her loss whereas the general public through the State Fund has not been forced to absorb the loss and suffers no great degree of harm. This is totally contrary to the risk-shifting concept of the Worker's Compensation Act. In a nutshell, the state is commanded by statute to buy the death benefit right from the dependent; while what happened here is that the death benefit right was taken by an unauthorized extension of the lien against a clearly separate independent statutory right, without just compensation.

On the assumption that the foregoing premise is reasonable, the final issue to be addressed is that of what is just compensation.

The *Fifth and Fourteenth Amendments, supra,* require that a person receive "just compensation" for property that has been taken by the state or federal government. The Supreme court has said that the constitutional guarantee of just compensation is not a limitation of the power of eminent domain, but only a condition

of its exercise. *Long Island Water Supply Company v. Brooklyn,* 166 U.S. 685, 689 (1897). The most basic principle for determining the amount due an individual whose property has been taken is contained in the often quoted statement by Justice Holmes that the test is "what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1910). Thus, determination of what the injured property owner has lost fixes the amount for which the state is liable. Here the courts normally look to the market value of the property that has been taken. However, in this case, such an analysis need not be reached for the market value of cash, is its face value.

Finally, in petitioning for this discretionary writ, the undersigned would be remiss in not directing the attention of this Honorable Court to the human tragedy involving the denial of death benefits to a widow who lost her husband due to an on-the-job injury.

Granted this case does not involve headline moral issues such as when life may begin, continue, or be terminated Nor does it challenge the power of any branch of government. What it does involve is a sixty year old widow, who is deprived of her husband, and then her widow's benefits. Is she a member of a class entitled to be protected by this Court? Yes.

Here the Petitioner has been denied a benefit to which she has been legally found entitled and yet she walks through life alone. She has depended on receiving these benefits and they have now been wrongfully taken. The courts of the State of Arizona have offered no remedy, content to protect the public insurance carrier despite the intent of the statutes and constitutional commands to the contrary. This Court is the last chance this widow has against the monolithic Industrial Commission of Arizona to set right this travesty of justice.

I therefore *implore* this Court to take jurisdiction of this case and restore the Petitioner's constitutional right to worker's compensation widow's benefits.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this most Honorable Court grant her Petition for Writ of Certiorari, or in the alternative, that the Opinion and Order of the Court of Appeals of the State of Arizona, Division One, be summarily reversed, or such other and further relief as to this Honorable Court may appear appropriate.

RESPECTFULLY SUBMITTED this 11 day of December, 1984.

RABINOVITZ, DIX & REHLING, P.C.

By _____

Bernard I Rabinovitz
P.O. Box 41658
Tucson, Arizona 85717
(602) 624-5526
Attorneys for Petitioner

APPENDIX A

FLORENCE E. MANNEL,
Petitioner,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DEPARTMENT OF TRANSPORTATION,
Respondent Employer,

STATE COMPENSATION FUND,
Respondent Carrier.

I CA-IC 3021

DEPARTMENT B

O P I N I O N

Special Action—Industrial Commission
ICA CLAIM NO. 454-12-6153
CARRIER NO. 78-34366
Administrative Law Judge Jerry C. Schmidt
AWARD AFFIRMED

Rabinovitz, Dix & Rehling, P.C.
by Bernard I. Rabinovitz
Attorneys for Petitioner — Tucson

Sandra Day, Chief Counsel
The Industrial Commission of Arizona
Attorney for the Respondent — Phoenix

Robert K. Park, Chief Counsel
State Compensation Fund
by James F. Crane
Attorneys for Respondents Employer & Carrier — Tucson

GREER, Judge

This is a special action review of an Industrial Commission award granting death benefits, but subjecting them to the compensation insurer's credit from an A.R.S. § 23-1023 lien on specified proceeds from the employee's settlement of his claim with the third party tortfeasor. The issue presented is whether present death benefits that had not matured when the employee's third party claim against the tortfeasor was settled are subject to the credit. We hold that the benefits are subject to the credit, and therefore affirm the award.

The petitioner (wife or widow) is the only dependent of the deceased employeee. In September, 1978, the employee suffered a compensable industrial injury caused by negligent third parties. The employee successfully claimed worker's compensation benefits, and he and his wife sued the third parties.[1] The parties subsequently settled, released the third party tortfeasors from all present and future claims,[2] and received the settlement proceeds. The compensation carrier approved the settlement, received reimbursement of compensation already paid to the employee ($24,655.57), and reserved a credit against future liability

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[1]The complaint alleged that "the plaintiff has sustained severe and permanent injuries; has undergone and will continue to undergo medical treatment and expense, has suffered and will continue to suffer indefinitely in the future from pain, suffering, aggravation, inconvenience, and in addition, has suffered wage losses in the past and a loss of earning and earning capacity in the future." It sought "compensatory damages to reasonably and justly compensate plaintiffs for their losses," punitive damages, costs, and other relief.

[2]The release applies to "all claims, actions, causes of action, claims for relief, claims for loss of consortium, demands, rights, damages, costs, expenses or compensation whatsoever which [they] now have or may have on account or in any way growing out of the personal injuries sustained by [the employee] . . . ." It also acknowledges that the employee "may have sustained injuries that are presently unknown to him or anyone else and that there may be unforeseen consequences for both such known and unknown injuries and it is [their] express intention. . . that all such injuries and potential injuries and potential consequences thereof are covered by and included in this release."

($90,194,70),[3] which credit would diminish as the worker's benefits accrued.

After this settlement and approval, the employee's disability benefits countinued to accrue, and the compensation carrier applied them to reduce the credit. In April 1982, the employee died. The employee's right to future disability benefits ceased, but the widow's right to death benefits matured. A.R.S. § 23-1045(B), A.R.S. § 23-1046. The credit balance was then approximately $79,000.

The widow claimed death benefits. The compensation carrier denied the claim, and in the alternative subjected the death benefits to the outstanding credit. At the scheduled hearings, the widow established that the industrial injury caused the employee's death. She also testified that she did not know how much of the original settlement proceeds remained, but that what remained was hers by right of survivorship. The administrative law judge issued the award granting death benefits, but subjecting them to the credit. The award was affirmed on administrative review, and this special action followed.

A.R.S. § 23-1023 states, in relevant parts:

> A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.
>
> * * *

---

[3]There are two approval agreements. Concerning the compensation carrier's credit, the first states that the satisfaction of the carrier's lien "is not intended to and does not affect the rights or obligations of [the employee, his employer, and the compensation carrier] under the workmen's compensation laws of this state as to future benefits that may be due to [the employee]... or future credits that may be due [the compensation carrier and the employer]...." The second states that this credit "shall apply to all heretofore incurred but unpaid medical benefits and disability compensation, if any, and to all future medical benefits and disability compensation for which [the carrier] may become liable by virtue of a Notice of Claim Status issued by [the carrier], or an award of the Industrial Commission of Arizona."

> C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid.

These subsections concern the same subject; they therefore are interpreted as a whole. *Talley v. Industrial Commission,* 1 CA-IC 2809 (Ariz. App. Aug. 16, 1983). The general purposes of this statutory lien are to require the third party to pay what he would normally pay if there were no workers' compensation, to reimburse the carrier for its compensation expenditure, and to allow the compensation beneficiary to enjoy the excess of the damage recovery over compensation. 2A A. Larson, *Workmen's Compensation Law* § 74.16(a) (1983). This statutory lien is an exception to the general rule that an insurance company may not be an assignee or a subrogee of its insured's tort claim. *Talley v. Industrial Commission,* slip op. at 5-6. The statutory terms determine whether a lien is allowed. *Sunstate Equipment Corp. v. Industrial Commission,* 135 Ariz. 477, 662 P.2d 152 (App. 1983). If a lien is allowed, it applied to the entire third party recovery (less expenses and attorney's fees), even though this recovery includes damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouse's loss of consortium). *Liberty Mutual Insurance Co. v. Western Casualty & Surety Co.,* 111 Ariz. 259,527 P.2d 1091 (1974).

The hearing judge relied on *Triste v. Industrial Commission,* 25 Ariz. App. 489, 544 P.2d 706 (1976) as authority for the award. The widow contends that *Triste* is not controlling due to factual differences and new arguments that she raises which were not addressed in *Triste.*

In *Triste,* the carrier was entitled to have its death benefit obligation offset by a § 23-1023 lien on settlement proceeds. The deceased employee had had a compensable back injury, but while undergoing surgery for it suffered a cardiac arrest. He was comatose for over three years until he died. Before his death, his wife

sued for medical malpractice in the capacity of his guardian and next best friend of the minor children. With the compensation carrier's consent, she settled and executed a general release for all present and future claims. After the employee died, the wife and her minor children claimed workers' compensation death benefits. Benefits were granted, but offset by a lien on the settlement proceeds. On review, the claimants conceded that the lien properly applied to offset the widow's death benefits and would properly apply to offset the children's, provided the children were properly represented in the third party settlement; claimants argued the children were not properly represented. The court rejected the challenge to the representation and affirmed the award.

The widow argues that *Triste* is factually different. She contends the third party suit in that case must have involved a wrongful death claim because the children otherwise had no separate claim for relief. It is true that children do not have a separate claim, *Jeune v. Del E. Webb Construction Co.*, 77 Ariz. 226, 269 P.2d 723 (1954), *overruled on other grounds* 108 Ariz. 582, 503 P.2d 803 (1973) (recognizing spouse's claim for loss of consortium), however it does not follow that the children sued the third party for wrongful death. The children had potential wrongful death claims. A valid compromise of those claims subjected their subsequently matured death benefits to the lien credit: "[I]f the settlement was a valid compromise of the *potential* claims of the children, then the carrier would be entitled to set off the net amount of the settlement proceeds after deducting the expenditures for the deceased against its obligation for payment of death benefits." *Triste v. Industrial Commission*, 25 Ariz. App. 491, 544 P.2d 708 (emphasis added).

Triste therefore is not factually distinct. Here the widow also had a potential wrongful death claim which she compromised. The case at bar is even stronger, because unlike the children in *Triste*, here the widow had an *actual* claim for loss of consortium when the claim was settled.

The widow next argues that *Triste* did not address the statutory interpretation arguments that she now presents. We agree. *Triste resolved only the narrow question of whether the children's*

claims were effectively compromised. Although it did not address her agruments, it assumed a rule contrary to the widow's position. Triste interpreted § 23-1023(C) to give the compensation carrier "a lien in the amount actually collectible from the [third party tortfeasor] to the extent of the carrier's obligation for *compensation benefits." Triste v. Industrial Commission,* 25 Ariz. App. 491, 544 P.2d 708 (1976) (emphasis added). Compensation benefits include medical benefits, disability benefits, and death benefits. *See* A.R.S. § 23-901(4). Furthermore, this interpretation is consistent with the general purpose of the lien statute to reimburse the carrier for its compensation expenditure.

The widow argues that this interpretation conflicts with the terms of § 23-1023. She relies on the general principle that disability benefits are distinct from death benefits. We agree that benefits are an independent statutory right that do not derive from the decedent. A worker's compromise of his rights to workers' compensation medical expenses and disability benefits does not affect the rights of his dependent's death benefits. *See, e.g., Kay v. Hillside Mines, Inc.,* 54 Ariz. 36, 91 P.2d 867 (1939); accord 2 A. Larson, *supra,* § 64. We disagree, however, that this general principle supports the widow's statutory interpretation arguments.

The widow first argues that the lien applies to only the employee's third party recovery because subsection (A) allows only the injured employee to "pursue *his* remedy against such other person." A.R.S. § 23-1023(a) (emphasis added). This interpretation of "his" ignores the immediately preceding phrase referring to the employee's dependents if he should die.[5]

Additionally, the widow's interpretation is anomalous because the injured employee and his dependents may have simultaneous civil remedies: a survival action brought by the personal representative for the decedent's estate, *see In Re Estate of Milliman,* 101

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[5]Section 23-1023(B) makes the intended reference clear: "if the employee entitled to compensation under this chapter, or his dependents, does not pursue *his or their* remedy against such other person ...." A.R.S. § 23-1023(B) (emphasis added).

Ariz. 54, 415 P.2d 877 (1966); *Barragan v. Superior Court,* 12 Ariz. App. 402, 470 P.2d 722 (1970), and a wrongful death action brought in the name of the personal representative or the surviving spouse for the benefit of the statutory beneficiaries, *see* A.R.S. §§ 12-611, 12-612, 14-3110. Both may have simultaneous claims for workers' compensation: the deceased employee's estate for benefits that accrued while the deceased was alive, *see Reed v. Industrial commission,* 104 Ariz. 412, 454 P.2d 157 (1969), and the dependents for death benefits, *see* A.R.S. § 23-1046.

The widow next argues that if only the injured employee pursues his third party claim, the lien applies to offset his benefits only. First, this argument ignores the fact that the injured employee's third party recovery precludes the dependent's independent wrongful death recovery. *See e.g., Mellon v. Goodyear,* 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928).[6] Second, the employee's third party recovery is the only fund from which the compensation carrier can be reimbursed for its compensation payments. The widow's argument would be persuasive if the dependents had a viable wrongful death claim. In that case, the carrier would have a separate fund for reimbursement for death benefits. *Cf. Roberts v. All American Engineering Co.,* 104 N.J. Super. 1, 248 A.2d 280 (1968) (lien applied only to employee's benefits because widow was not a party to the third party settlement and had a viable wrongful death claim). However, in the present case the widow participated in the third party settlement, and compromised both her actual loss of consortium claims and her potential wrongful death claim. The effect of the settlement is to settle her claims.

The widow next argues that if only the injured employee is receiving compensation benefits when the Claim is settled, the lien applied to offset his benefits only because subsection (C) allows the lien "to the extent of *such* compensation and medical, surgical and hospital benefits paid." A.R.S. § 23-1023(C) (empha-

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[6]This rule has been criticized. *See, e.g., Sea-Land Services Inc. v. Gaudet,* 414 U.S. 573, 94 S. Ct. 806, 39 L. Ed.2d 9 (1974) (refusing to extend traditional rule to maritime law). *See generally* 25A C.J.S. Death § 47(b) (1966).

sis added). She interprets the word "such" to refer to the compensation benefits paid to the compensation beneficiary when the third party claim was settled. Although this is a possible interpretation, we disagree that it is the most natural one.

The predecessor to the current 23-1023 required the claimant to elect between his civil remedy and workers' compensation. *See, e.g.,* Laws 1925, Ch. 83. § 66. The current version eliminates this election and requires the carrier to pay "compensation and medical, surgical and hospital benefits...as provided in this chapter...." A.R.S. § 23-1023(C). The revision provides for the compensation carrier's reimbursement by giving it "a lien on the amount actually collectable from such other person [the third party] to the extent of such compensation and medical, surgical and hospital benefits paid." A.R.S. § 23-1023(C). Because the carrier is required to pay all compensation, including death benefits, even if the third party claim is pursued, death benefits should be included in the compensation benefits that the lien offsets.

The widow also argues that any ambiguity in § 23-1023 should be resolved in her favor to achieve the remedial purpose of the workers' compensation law. One purpose of § 23-1023, however, is to reimburse the compensation carrier for its expenditure.

The issue was raised at oral argument that death benefits should be excluded from § 23-1023 because they are not specifically included in the statute. In *Hornback v. Industrial Commission,* 106 Ariz. 216, 474 P.2d 807 (1970), the Arizona Supreme Court recognized that absent carrier approval of a third party settlement, a worker was not entitled to reopen his claim and thereby receive additional benefits, even though the original settlement was for $10,000, whereas the benefits awarded were only accident benefits and $266.06. The supreme court rejected the worker's argument that since the settlement exceeded the compensation benefits, carrier approval was unnecessary because the carrier had no interest in the settlement, not being liable for any deficiency in the settlement.

The supreme court was unable to accept the worker's argument because it ignores the fact that the employee in this action is seeking to reopen his claim and seek more compensation.

106 Ariz. at 220. The supreme court's reasoning implies that carrier approval of a third party claim is a prerequisite to reopening because the carrier is entitled to protect its subrogation rights to "all rights of the employee against a third party tortfeasor," *id.* at 219, including those rights which would reimburse reopening benefits. This is so even though § 23-1023 does not specifically mention reopening benefits. Since the supreme court recognizes a carrier's interest in protecting its lien to reimburse the carrier's liability for reopening benefits, we cannot say that the carrier lacks an interest in the settlement for reimbursement of death benefits.[7]

We recognize conflicting out-of-state authority on this question.[8] Some cases rely on dissimilar statutes. *E.g., Transcontinental Insurance Co. v. Walsh,* 621 S.W.2d 461 (Tex. App. 1981) (statute applied the lien to third party recovery by "a workman's compensation beneficiary...entitled to compensation...."). Others are less obviously distinguishable, *see, e.g., Cresci v. Mike Krasilousky Trucking Co.,* 172 N.Y.S.2d 322 (1958), and often rely on the distinction between disability and death benefits, *see generally* 2A A. Larson, *supra,* § 23-1023, however Arizona laws and not out-of-state authority, are determinative.

Finally, the widow argues that the application of a § 23-1023 lien to offset death benefits violates the Arizona constitutional provision on workers' compensation. *See* Ariz. Const. Art. 18, §

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[7]A. Larson (2A A. Larson, *Workmen's Compensation Law,* §§ 71.20, 74-16(a) (1983)) recognizes that the objectives of a good workmen's compensation statute are many and varied, and "with all these balls to be kept in the air at the same time, it is perhaps not surprising that a few statutes have perfectly performed this juggling act." § 74.16 at 14-355.

[8]Other cases are consistent. *E.g., Richardson v. U.S.F. & G., 102 So.2d 368 (Miss. 1958).*

8.[9] This paragraph prohibits a reduction in the percentages and amounts of compensation provided in the original worker's compensation act. *See Atkins v. Industrial Commission,* 95 Ariz. 239, 389 P2d 118 (1964). The widow's death benefits have not been reduced; she is credited with the full amount allowed by A.R.S. § 23-1046. The compensation carrier, however, is not required to make an actual payment of death benefits until the credit is exhausted.

For the foregoing reasons, the award is affirmed.

D.L. GREER, Judge

CONCURRING:

BRUCE E. MEYERSON
Presiding Judge, Department B

DONALD F. FROEB, Judge

[9]Article 18, section 8 states in relevant part:

The percentages and amount of compensation provided in House Bill No. 227 enacted by the Seventh Legislature of the State of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated except by initiated or referred measure as provided by this Constitution.

APPENDIX B

RE: FLORENCE L. MANNEL vs.
INDUSTRIAL COMMISSION et al
Supreme Court No. 17621-PR
Court of Appeals No. 1 CA-IC 3021
Industrial Commission No. 454-12-6153

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 13, 1984, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 14th day of September 1984.

S. ALAN COOK, Clerk

TO: Bernard I. Rabinovitz, Esq.
Sandra Day, Esq., Chief Counsel, Industrial Commission
Robert F. Park, Esq., Chief Counsel, State Compensation Fund
James F. Crane, Esq., State Compensation Fund, Tucson
Glen D. Clark, Clerk, Court of Appeals, Division One

APPENDIX C

FLORENCE E. MANNEL, *Petitioner,*	Supreme Court No. 17621-PR
vs.	Court of Appeals No. 1 CA-IC 3021
THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*	Industrial Commission No. 454-12-6153
DEPARTMENT OF TRANSPORTATION, *Respondent Employer,*	
STATE COMPENSATION FUND, *Respondent Carrier.*	

ORDER

IT IS ORDERED that Petitioner's "Motion for Permission to File Motion for Reconsideration" is denied.

DATED this 2nd day of October, 1984.

WILLIAM A. HOLOHAN
Chief Justice

TO: Bernard I. Rabinovitz, Esq., Rabinovitz, Dix & Rehling, 721 N. 4th Ave., Tucson, AZ 85705
James Crane, Esq., State Compensation Fund, 55 E. Helen St., Tucson, AZ 85705
Sandra Day, Chief Counsel, Industrial Commission of Arizona, P.O. Box 19070, Tucson, AZ 85005
Robert K. Park, Chief Counsel, State Compensation Fund, P.O. Box 6769, Phoenix, AZ 85005

APPENDIX D

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

THE ESTATE OF
HOWARD MANNEL, *Deceased,*
FLORENCE E. MANNEL, *Widow,*
Applicant,

vs.

DEPARTMENT OF
TRANSPORTATION
Defendant Employer,

STATE
COMPENSATION FUND,
Defendant Insurance Carrier

ICA Claim No. 454-12-6153
Carrier Claim No. 78-34366
Date of Injury: 9-21-78

DECISION UPON HEARING
AND FINDINGS AND AWARD
GRANTING
WINDOW'S CLAIM FOR
DEATH BENEFITS AND
FOR LIEN PURSUANT
TO A.R.S. §23-1023

Heretofore, on October 12, 1978, Howard Mannel, the deceased, filed a claim for workmen's compensation benefits for an industrial injury sustained while employed by the above-named defendant employer on September 21, 1978.

The defendant insurance carrier herein accepted Mr. Mannel's claim and on September 2, 1981 issued a NOTICE OF CLAIM STATUS asserting its lien against third party settlement. On May 14, 1982 Florence Mannel, the widow and applicant herein, filed a claim for death benefits for the death of her husband on April 16, 1982. On June 4, 1982 the defendant insurance carrier denied the applicant's claim.

Thereafter, on August 13, 1982 the applicant filed a REQUEST FOR HEARING and pursuant thereto, formal hearings were held in Tucson, Arizona on January 3, 28 and February 7, 1983. The applicant is represented by Mr. Bernard I. Rabinovitz and the defendant insurance carrier is represented by Mr. James F. Crane.

The undersigned, having fully considered the file, records and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On September 21, 1978 Howard Mannel sustained an industrial injury while employed by the above-named defendant employer who at said time was insured under the provisions of the Arizona Workmen's Compensation Act against liability for the payment of medical, surgical, hospital and/or compensation benefits. The applicant herein entered into an agreement to compromise and settle a third party claim which arose out of the subject industrial episode for the sum of $160,000.00. The State Compensation Fund approved the settlement and received the sum of $24,655.57 in complete payment of its claim lien to that point and asserted a credit against the payment of any further compensation, medical, surgical and hospital benefits.

2. On September 21, 1978 Howard Mannel was checking the temperature of a truck load of hot asphalt when the truck lurched forward causing him to fall into the material. Mr. Mannel quickly removed himself avoiding any burns and in the process sustained

a strain of the right shoulder and neck.
Within a short time of that episode Mr. Mannel began experiencing extreme shortness of breath which increased in intensity and resulted in his seeking medical attention. He was found to be in atrial fibrillation and underwent cardioversions. The applicant's symptoms persisted and it was ultimately determined that he had sustained a ruptured Chordea tendonea of the mitral valve causing mitral valve insufficiency. Mr. Mannel's physical condition progressively deteriorated resulting in several hospitalizations and installation of a pacemaker. Mr. Mannel's condition was essentially inoperable and he was totally disabled. In the last month or so before his death his wife observed a change in his complexion and testified that he spent most of his time sleeping and that he was having more difficulty than he had previously with shortness of breath. On April 16, 1982 Mr. Mannel died a sudden death in a barber's chair while having a haircut. At the time of his death there was a credit still in existence in the sum of approximately $79,000.00.

3. Board certified cardiologist, John Carroll, M.D., testified that he first saw the deceased in 1973 in consultation and did not see him again until 1979 when he appeared with complaints of sudden shortness of breath and irregularity of heartbeat. Dr. Carroll testified regarding his findings upon examining the applicant as well as his treatment thereafter for mitral valve insufficiency. Dr. Carroll testified during the year prior to Mr. Mannel's death he observed a progressive deterioration of his physical condition. It was Dr. Carroll's opinion that Mr. Mannel died of sudden cardiac arrhythmia ventricular fibrillation. Dr. Carroll testified further that it was his opinion within a reasonable degree of medical probability that Mr. Mannel's sudden death was the result of the industrial injury, treatment and medication.

4. Board certified cardiologist, Richard McCarty, M.D., testified regarding his findings upon examining Mr. Mannel in June 1979. It was Dr. McCarty's opinion that Mr. Mannel had sustained a ruptured mitral valve Chordea Tendonae as a result of the industrial accident of September 21, 1978. In response to a lengthy hypothetical setting forth the history of Mr. Mannel's physical deterioration and death following Dr. McCarty's exami-

nation, Dr. McCarty responded that there was no doubt in his mind that the sudden death was causally related to the mitral valve insufficiency which was contributed to by the subject industrial episode of September 1978.

5. Board certified cardiologist, Brendan Phibbs, M.D. testified to his findings upon examining the applicant in June 1981. In response to questions concerning the cause of Mr. Mannel's sudden death Dr. Phibbs stated that he was unable to respond because no autopsy had been performed and that there were a number of "things" or "diseases" which could cause sudden death.

6. An applicant seeking to recover death benefits has the burden of proof by a preponderance of the evidence to establish all of the material elements of her claim, *Russell v. Industrial Commission,* 104 Ariz. 548, 456 P.2d 918 (1969). The term preponderance was defined by the Court of Appeals in *Brooks v. Industrial Commission,* 24 Ariz. App. 395, 539 P. 2d 199 (1975) as follows:

> "Preponderance of the evidence means such evidence as when weighed with that opposed to it has more convincing force, and from which it results that a greater probability is in favor of the party upon whom the burden rests. It does not necessarily depend upon the number of witnesses; it merely means that the testimony which points to one conclusion appears to the trier of facts to be more credible than the testimony which points to the opposite one. The capacity of the submitted testimony to enforce belief on the arbiter to whom it is submitted is the touchstone of preponderance as applied to the testimony of witnesses." (Citations omitted)

7. Under the Workmen's Compensation Act two independent and separate rights of recovery exist, the one of the workman during his lifetime and the other of his dependents after his death, *Kay v. Hillside Mines, Inc.,* 54 Ariz. 36, 91 Pac. (2d) 867 (1939). In the instant case the applicant must establish a causal relationship between the industrial injury and the decedent's ultimate demise. *Brown v. Industrial Commission,* 20 Ariz. App. 486, 513 P.2d 1369 (1973). Moreover, such facts pertaining to medical causation must be established to a reasonable medical probability or

certainty, *Micucci v. Industrial Commission,* 108 Ariz. 194, 494 P.2d 1324 (1972). The Industrial Commission cannot find such a relationship based upon mere possibilities, *Gronowski v. Industrial Commission,* 81 Ariz. 363, 306 P.2d 285 (1957) or where the medical evidence is fraught with uncertainty, *Cross v. Industrial Commission, 81 Ariz. 222, 303 P.2d 710 (1956). Where there exists a conflict in the expert medical evidence it is the responsibility of the Administrative Law Judge to resolve it, Walters v. Industrial Commission,* ____ Ariz. ____ (Ct. App.) ____ P.2d ____ (1 CA-IC 2720, 12/21/82).

8. In the instant case although Dr. Phibbs could not offer an opinion regarding the cause of the death of Mr. Mannel, there nevertheless exists a conflict between the experts, *State Compensation Fund v. Industrial Commission,* 24 Ariz. App. 31, 535 P.2d 623 (1975). This conflict is resolved by adopting the opinions of Drs. Carroll and McCarty as being more probably correct. The preponderance of the evidence establishes that the demise of Howard Mannel was within a reasonable degree of medical probability caused by the subject industrial episode and resultant injury.

9. A.R.S. §23-1023 sets forth the liability of third persons to injured employees and provides:

> "A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.
>
> "...
>
> "C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery.

> The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

Under the statutory provision an injured employee may sue a third party and collect workmen's compensation benefits, however, the employer or the employer's carrier has a lien on the amount the employee receives from the third party to the extent of the benefits the employer is required by law to provide, *Chevron Chemical Co. v. Superior Court,* 131 Ariz. 431, 641 P.2d 1275 (1982). Such third party settlement agreements are subject to the written approval of the defendant insurance carrier, *Liberty Mutual Insurance Company v. Western Casualty and Surety Company,* 111 Ariz. 259, 529 P.2d 1091 (1974). The doctrine of equitable subrogation is founded on principles of equity and its purpose is a prevention of injustice and it is adopted by equity to compel ultimate payment of a debt by one who in justice and good conscience ought to pay it. *Kilpatrick v. Superior Court,* 105 Ariz. 413, 466 P.2d 18 (1970). The purpose of the subrogation provision is to compensate the employer and the insurance carrier to some extent for the additional liability they assume under the Workmen's Compensation Act for wrongful acts of independent third party tort-feasors, *Fisher v. Missoula White Pine Sash Company,* 518 P.2d 795 (Montana, 1974).

10. The question presented is whether the defendant insurance carrier given the circumstances of the settlement with the third party is entitled to set off the settlement proceeds against the death benefits due to the applicant/widow. On July 13, 1981 the decedent and his surviving spouse entered into an "Agreement to Compromise and Settle Claims and Release of all Claims" which provided in part:

> "...(D)o hereby for themselves, their heirs, executors, administrators, successors and assigns, release, acquit,

exonerate and forever discharge...(the third party)...of and from any and all claims, actions, causes of action, claims for relief, claims for loss of consortium, demands, rights, damages, costs, expenses or compensation whatsoever which the undersigned now have or may have on account of or in any way growing out of the personal injuries sustained by Howard M. Mannel on or about September 21, 1978..."

The agreement set forth the knowledge of the decedent and his surviving spouse that the injuries were permanent, progressive and disabling in nature and that he may have sustained injuries which were presently unknown at the time of entering into the agreement and that there "may be unforseen consequences for both such known and unknown injuries". The agreement proceeded to release the third party for all "such injuries and potential and potential consequences".

11. There appears to be only one Arizona case similar in nature to the issue presented and it admittedly has nominal distinctions. In *Triste v. Industrial Commission,* 25 Ariz. App. 489, 544 P.2d 706 (1976) the Court was called upon to determine whether the Commission correctly decided that the carrier, given the circumstances of a settlement with a third party was entitled to set off the settlement proceeds against the death benefits due for children of a deceased. The Court in allowing the set off observed:

"The parties here do not dispute that if the settlement was a valid compromise of the potential claims of the children, then the carrier would be entitled to set off the net amount of the settlement proceeds after deducting the expenditures for the deceased against its obligations for payment of death benefits..."

And

"Even if we assume that there was some technical deficiency in Mrs. Triste's representaton of her children in the settlement, we cannot conclude in the circumstances of this case that the carrier must be denied the setoff which the Commission awarded it. There is no suggestion that petitioner, or anyone else with an interest in this matter, wishes to undo the settlement which was made, and upon which proceeds have already been paid. This settlement was approved by the carrier on the petitioner's representation that it was a valid settlement of the family's rights. Under

ordinary principles of estoppel, a party to a settlement is not entitled to keep the benefits of it while renouncing the burdens...."

12. While apparently other jurisdictions have interpreted similar statutes differently it is felt that in the instant case, *Triste, supra,* is controlling. The defendant insurance carrier is entitled to set off the settlement proceeds against the death benefits due to the surviving spouse.

13. The defendant insurance carrier is liable for such expenses of burial of the deceased not to exceed the sum provided for in A.R.S. §23-1046 as it was in effect at the time of the subject industrial episode.

14. The applicant is entitled to such compensation benefits as provided for in A.R.S. §23-1046 A(2) as was in effect at the time of the subject industrial episode.

15. That by virtue of the settlement of the decedent's third party action, no benefits are payable until a new credit of $79,000.00 is exhausted.

A W A R D

THE APPLICANT IS HEREBY AWARDED:

1. Expenses of burial of the deceased from the defendant insurance carrier not to exceed the sum provided for in A.R.S. §23-1046 as it was in effect at the time of the subject industrial episode.

2. Such compensation benefits as provided for in A.R.S. §23-1046 A(2) as was in effect at the time of the subject industrial episode.

3. That by virtue of the settlement of the decedent's third party action, no benefits are payable until a new credit of Seventy-Nine Thousand and No/100 Dollars ($79,000.00) is exhausted.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of The Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided for by Arizona Revised Statutes, §23-942 D and §23-943 A and B (1973). Unless such written request is made within the time provided, this Award is final.

By_____
JERRY C. SCHMIDT
Administrative Law Judge

JCS:bes
DATED AND MAILED IN TUCSON, ARIZONA THIS 16TH DAY OF FEBRUARY 1983.

APPENDIX E

§23-1021. Right of employee to compensation

A. Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment, wherever the injury occurred, unless the injury was purposely self-inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as are provided by this chapter.

B. Every employee covered by insurance in the state compensation fund who is injured by accident arising out of and in the course of employment, and the dependents of every such employee who is killed, provided the injury was not purposely self-inflicted, shall be paid such compensation from the state compensation fund for loss sustained on account of the injury, shall receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as provided in this chapter.

§23-1023. Liability of third person to injured employee; election of remedies

A. If any employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety

to the employee or his dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

§23-1046. Death benefits

A. In case of an injury causing death, the compensation therefor shall be known as a death benefit, and shall be payable in the amount, for the period, and to and for the benefit of the persons following:

1. Burial expenses, not to exceed one thousand dollars, in addition to the compensation.

2. To the surviving spouse, if there is no child, thirty-five per cent of the average wage of the deceased, to be paid until such spouse's death or remarriage, with two years' compensation in one sum upon remarriage.

3. To the widow or widower, if there is a child or children, the additional amount of fifteen per cent of such wage for each child

until the age of eighteen years, the total not to exceed sixty-six and two-thirds per cent of the average wage.

4. To a single surviving child, in the case of the subsequent death of a surviving husband or wife, or if there is no surviving husband or wife, twenty-five per cent of such average wages, or if there is more than one surviving child, twenty-five per cent for one child and fifteen per cent for each additional child, to be divided among such children share and share alike, but not exceeding a total of sixty-six and two-thirds per cent of the average wage. Compensation to any such child shall cease upon death, marriage or upon reaching the age of eighteen years, except, if over eighteen years and incapable of self-support, when it becomes capable of self-support.

5. To a parent, if there is no surviving husband, wife or child under the age of eighteen years, if wholly dependent for support upon the deceased employee at the time of his death, twenty-five per cent of the average monthly wage of the deceased during dependency, with an added allowance of fifteen per cent if two dependent parents survive, and, if neither parent is wholly dependent, but one or both partly dependent, fifteen per cent divided between them share and share alike.

6. To brothers or sisters under the age of eighteen years, if there is no surviving husband or wife, dependent children under the age of eighteen years or dependent parent, the following shall govern:

(a) If one of the brothers or sisters is wholly dependent upon the deceased employee for support at the time of injury causing death, twenty-five per cent of the average monthly wage until the age of eighteen years.

(b) If more than one brother or sister is wholly dependent, thirty-five per cent of the average monthly wage at the time of injury causing death, divided among such dependents share and share alike.

(c) If none of the brothers or sisters is wholly dependent, but one or more partly dependent, fifteen per cent divided among such dependents share and share alike.

B. If the deceased employee leaves dependents only partially dependent upon his earnings for support at the time of injury, the monthly compensation shall be equal to such proportion of the monthly payments for the benefit of persons totally dependent as the amount contributed by the employee to such partial dependents bears to the average wage of the deceased at the time of the injury resulting in his death. The duration of compensation to partial dependents shall be fixed by the commission in accordance with the facts shown, and in accordance with the provisions of § 23-1047, but shall in no case exceed compensation for one hundred months.

C. A death benefit paid to an alien not residing in the United States shall be only sixty per cent of the amount specified in this section.

D. In event of death of a dependent before expiration of the time named in the award, the funeral expenses of such person, not to exceed eight hundred dollars, shall be paid.

APPENDIX F

Art. 18 § 8

Section 8. The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the Legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment peronal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer or any person employed by said employer, acting in the scope of his employment, as provided by this Constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury, except that if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such

employee may, after the injury, exercise the option to accept compensation or to retain the right to sue the person who injured him.

The percentage and amounts of compensation provided in House Bill No. 227[1] enacted by the Seventh Legislature of the Sate of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated expect by initiated or referred measure as provided by this Consitution.

Supreme Court, U.S.
FILED
JAN 15 1985
ALEXANDER L. STEVAS
CLERK

No. 84-946

In the Supreme Court of the United States

OCTOBER TERM, 1984

FLORENCE E. MANNEL
Petitioner,

v

INDUSTRIAL COMMISSION OF ARIZONA
Respondent,

DEPARTMENT OF TRANSPORTATION
Respondent Employer,

STATE COMPENSATION FUND
Respondent Carrier,

RESPONDENTS' BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Petitioner has shown pursuant to 28. U.S.C. Section 1257 (3) and *Rule* 21.1(h) of the *Rules of the Supreme Court of the United States* that the federal claim under the Taking Clause of the Fifth Amendment of the United States Constitution was adequately raised and considered in the Arizona State proceedings?

2. Whether any federal claim under the Taking Clause of the Fifth Amendment to the United States Constitution was raised at all in the Arizona State proceedings or were the Arizona State proceedings decided entirely upon State law?

3. Whether the application of the third-party lien provisions of A.R.S. §23-1023(c) to the Petitioner's dependents benefits, under the Arizona Workmen's Compensation Act was an unlawful taking under the Taking Clause of the Fifth Amendment to the United States Constitution?

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JURISDICTION

The Respondents object to the jurisdiction of this Court to consider the federal constitutional issues for the reasons submitted herein.

OTHER CONSTITUTIONAL PROVISIONS

ARIZONA CONSTITUTIONAL PROVISIONS

ARTICLE, 2, §4 *Due process of law*

Section 4. No person shall be deprived of life, liberty, or property without due process of law.

ARTICLE 2, §17 *Eminent domain; just compensation for private property taken; public use as judicial question*

Section 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the State treasury for the owner on such terms and conditions as the Legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit for any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

STATEMENT OF THE CASE

The Petitioner is the only dependent of the deceased employee who suffered a compensable industrial injury in September of 1978 caused by negligent third parties. The employee successfully claimed workmen's compensation benefits, and he and his wife sued the third parties. The parties, including the employee and the Petitioner, subsequently settled, released the third-party tortfeasors from all the present and future claims, and received the settlement proceeds. The Respondent Insurance Carrier approved the settlement and received reimbursement of the compensation benefits already paid to the employee at the time of the settlement pursuant to A.R.S. §23-1023(C), the statutory third-party lien provision. The Respondent Insurance Carrier also reserved a credit against all future liability of $90,194.70 which credit would diminish as employee's benefits accrued.

In April of 1982, the employee died. At the time of his death his disability benefits had accrued to the extent that the Respondent Insurance Carrier's credit was decreased to approximately $79,000.00.

The Petitioner filed a claim for death benefits with the Respondent Industrial Commission of Arizona. The Respondent Insurance Carrier denied the claim and alternatively, posed the remaining credit on the death benefits. It was not a "new credit or lien" as alleged by the Petitioner in her Statement of the Case. The Respondent Industrial Commission awarded the Petitioner death benefits subject to the outstanding credit. This award was affirmed upon administrative review and the Petitioner sought review by the Arizona Court of Appeals. The Arizona Court of Appeals considered the various contentions raised by the Petitioner, all concerning Arizona State law, and affirmed the Respondent Industrial Commission of Arizona's award specifically finding that the extension of the credit to the death benefits was proper under Arizona law. The Petitioner sought review by the Arizona Supreme Court but review was denied.

It is from this Court of Appeals Opinion herein that Petitioner seeks to have this Court review. For the first time the Petitioner now seeks consideration of a federal constitutional issue.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Objections To The Jurisdiction Of This Court To Grant Writ of Certiorari: The Petitioner Has Failed To Show In Her Petition For Writ of Certiorari Pursuant To 28 U.S.C. Section 1257 (3) And Rule 21.1(h) Of The Rules Of The Supreme Court Of The United States, That Her Federal Claim Under The Taking Clause Of The Fifth Amendment Of The United States Constitution Was Adequately Raised And Considered In The Arizona State Courts, And, Therefore, The Petition For Writ of Certiorari Should Be Denied.

The Petitioner seeks to invoke the jurisdiction of this Honorable Court to consider her contentions regarding the Fifth Amendment's Taking Clause of the United States Constitution pursuant to 28 U.S.C. Section 1257 (3). That section provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "(1)...
> "(2)...
> "(3) By writ of certiorari,...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties of laws of the United States...."

This statute "requires that in the state courts petitioner have 'specifically set up or claimed under the Constitution...of...the United States' that right which she now seeks to have this court enforce." *Webb v. Webb,* 451 U.S. 493 (1981) In *Cardinale v. Louisiana,* 394 U.S. 437 (1969), the long-standing history of such requirement was set forth:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch

344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20 §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decision both before the *Crowell* opinion, *Miller v. Nicholls,* 4 Wheat. 311, 315 (1819), and since, e.g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 344, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940); *Whitney v. California,* 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis,* 20 Wall. 590 (1875)."

In *Webb v. Webb, supra* at p. 499, this Court set forth "powerful policy considerations" underlying this requirement for federal jurisdiction.

> "In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the State courts be afforded the opportunity to perform their duty, which include responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements."

This Court described the principle of comity that stands behind the "properly-raised-federal question" doctrine as similar to the doctrine that stands behind the exhaustion-of-state-remedies doctrine in federal habeas corpus review of the constitutional claims of State prisoners.

This Court in *Webb v. Webb, supra,* at pp. 500-501, also discussed practical reasons for insisting that federal issues be presented first in the state-court system:

"The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness or over-breadth. The rule also insured that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload this is a very substantial matter." *See, also, Illinois v. Gates U.S. , 103 S. Ct. 2317, 2323, 76 LEd. 2d 527 (1983)*

As pointed out in *Webb v. Webb, supra* at p. 495 *Rule* 21.1(h) of the *Rules of the Supreme Court of the United States* further requires the petitioner in such an attempt as herein to invoke the jurisdiction of the United States Supreme Court to:

"...specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

The foregoing principles suffice to dispose of Petitioner's request for certiorari. The Petitioner herein has failed to specify any of these requirements in the Statement of the Case or anywhere else in her Petition for Writ of Certiorari. She cannot sustain her burden of proving her federal claim was adequately raised in the state courts or considered therein. Therefore, her Petition for Writ of Certiorari should be dismissed not only for

failure to adhere to the *Rules of the Supreme Court of the United States* under *Rule* 33.7 but also for failure to show that her federal claim was adequately presented and considered in the state courts. A review of the record herein will, however, show that at no stage in the proceedings either in the "court of the first instance", in this case the Industrial Commission of Arizona, or in the appellate courts of Arizona did the Petitioner raise any federal issues, let alone the issue of the Taking Clause of the Fifth Amendment of the United States Constitution. It is clear from both the Decision Upon Hearing and Findings and Award Granting Widow's Claim for Death Benefits and for Lien Pursuant to A.R.S. §23-1023 (*See,* Appendix *D*) and the opinion of the Arizona Court of Appeals (*See,* Appendix *A*) that nowhere is any federal question mentioned, let alone expressly passed upon. The written opinion of the Arizona Court of Appeals was that of the highest court of Arizona because the Arizona Supreme Court denied review. (*See,* Appendix *B*) As stated by this Court in *Webb v. Webb, supra,* at p. 495:

> "This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Street v. New York,* 394 U.S. 576, 582 (1969)"

Arizona courts have consistently maintained when presented with attacks on statutes that they are unconsitutional under either state or federal constitutions that there is a presumption that they are constitutional unless otherwise shown, and, that "[W]e will not declare an act of the legislature unconstitutional unless we are satisfied beyond a reasonable doubt that the act is in conflict with the federal or state constitutions." *Chevron Chemical Company v. Superior Court,* 131 Ariz. 431, 641 P.2d 1275 (1982); *See, also, State v. Sutton,* 27 Ariz. App. 134, 551 P.2d 583 (1976) affirmed in part, remanded in part 115 Ariz. 417, 465 P.2d 1278 (1977); *State v. Davey,* 27 Ariz. 254, 232 P. 884 (1925). Therefore, since the highest court of Arizona failed to pass upon *any* federal

question and the Petitioner has failed to show affirmatively the contrary, the Petition for Writ of Certiorari herein should be denied.

Even if the entire record herein is reviewed it will clearly show that the Petitioner never raised either a federal question or specifically, the Taking Clause of the Fifth Amendment to the United States Constitution at any point in the state proceedings. Although Respondents recognize that this Court now disfavors the filing of the lower court record prior to this Court's action on a petition for certiorari, the Respondents have requested pursuant to Rule 19.1 that the Industrial Commission of Arizona forward the record to this Court pursuant to *Webb v. Webb, supra,* at p. 495, footnote 2.

A reveiw of the record herein will show the following:

(1) there is no mention whatsoever of any federal issue or citation in the transcripts of hearing before the Industrial Commission of Arizona;

(2) There was no mention whatsoever of any federal issue or citations in a post-hearing memorandum submitted by the Petitioner;

(3) There was no mention whatsoever of any federal issue or citations in the Industrial Commission's decision (*See,* Appendix *D*);

(4) In Petitioner's Request for Review to the Industrial Commission, the Petitioner argued that the Industrial Commission's decision "has essentially eliminated the widow's constitutionally guaranteed right to compensation benefits, but the argument was addressed to the Arizona Constitutional provision Article 18, §8. (*See,* Appendix *F*). The Petitioner also mentioned in the Request for Review the wording that the decision "would take the widow's constitutionally guaranteed death benefits without due process of law," and "further amounts to the taking of a constitutionally guaranteed property rights without due process of law." However, no mention was made of the federal law, federal case law or the federal constitution. Nor was there any request to consider any federal issues.

(5) In her Opening Brief to the Arizona Court of Appeals, the Petitioner cited one question presented to the court:

"Is the Award of the Industrial Commission of Arizona reasonably supported by the law and the evidence wherein it imposes a lien upon the entitlement of the Petitioner to recover widow's death benefits?"

The gist of the Petitioner's argument therein was that the decision below "essentially eliminated the widow's constitutionally guaranteed right to compensation benefits" citing the Arizona constitutional provisions that give rise to the statutory grant of such benefits. (*See* Appendix *F*) Later in the brief, the Petitioner briefly mentions "due process of law." The only other mention was, after making the contention that other state jurisdictions had refused to extend the third party lien to such a situation as herein, stated:

"To find otherwise, as the Administrative Law Judge has done, it tantamount to frustration of the spirit and intent of the Workmen's Compensation Act as well as a violation of *Article 18 Section 8* of the *Arizona Constitution* and further amounts to the taking of a constitutionally guaranteed property right without due process of law."

In the conclusion of the Opening Brief, the Petitioner only asserted that the decision below was "contrary to the statutes of this jurisdiction." There is also no citation to federal authority or the United States Constitution either in the body of the brief or the Table of Authorities.

(6) In the Petitioner's Reply Brief in the Arizona Court of Appeals no mention is made of federal case law or the United States Constitution. Furthermore, no mention is made of "due process", "taking" or any other similar language. The only constitutional contentions involved the Arizona Constitution.

(7) Absolutely no mention of any federal issue, federal law, constitutional issues or the Taking Clause of the Fifth Amendment were raised or decided in the opinion of the Court of Appeals herein, (*See,* Appendix *A*), with the exception of the citation to *Mellon v. Goodyear,* 277 U.S. 235 (1928)

(8) The Petitioner's Petition for Review before the Arizona

Supreme Court (*See*, Appendix *G*) shows that at no point was a federal constitutional right either placed in issue or decided upon at that level either. In the Petitioner's own "Synopsis of the Decision of the Court of Appeals", in discussing the issues presented and decided below, the Petitioner alleged:

> "The final argument of the Petitioner herein was that to award her benefits and withhold payment of the same under A.R.S. Section 23-1023 violated Arizona Constitution, Article 18, Section 8. The Honorable Court of Appeals felt that such was not the case." (*See*, Appendix *G*, p. 3)

Therein the Petitioner expressly acknowledged that her only constitutional contentions in the Arizona Court of Appeals were those involving Arizona Constitutional provisions.

In her "Issues Presented for Review" section of her Petition for Review the widow listed the following:

> "4. Have the widow's constitutional rights to death benefits been infringed upon by virtue of the Decision in the instant case?"

Although arguing that "[T]here are a variety of reasons" why this Arizona Supreme Court should grant review, there is no mention at all of any federal law, federal case law or the United States Constitution anywhere therein.

Furthermore, in the six pages dealing with reasons why the petition should be granted, no mention of constitutional concerns, either state or federal, is made. Only in the conclusion does the Petitioner assert that the decision below conflicts "with the Constitutional Rights of the widow to the payment of death benefits." (*See*, Appendix *G*, p. 11)

(9) In the Petitioner's Motion for Permission to File Motion for Reconsideration, in a final attempt to get the Arizona Supreme Court to consider reviewing the lower court's opinion, the Petitioner alleges only that the arguments presented in the Petition for Review "were substantial issues of law involving the constitutional rights of widows" and asks the Arizona Supreme Court to consider whether the widows of this State "are entitled to

equal protection of the laws." (*See* Appendix *H*) No mention is made of federal law, federal case law or the United State Constitution. Furthermore no mention is made of the Taking Clause "or due process" at all.

A thorough review of the record herein shows certain undeniable matters:

(1) At no point did the Arizona courts expressly consider and/or rule upon any federal constitutional issues.

(2) At no point in the Arizona proceedings did the Petitioner cite the Taking Clause of the Fifth Amendment to the United States Constitution, the United States Constitution, nor any federal authority whatsoever.

(3) At no point did the Petitioner in her pleadings fault the previous court for failure to consider federal constitutional issues.

(4) That the only colorable constitutional issue presented in the Arizona Courts was in relation to the widow's constitutional rights to death benefits under the Arizona Constitution not the Federal Constitution.

Whether or not use of words or phrases similar to "due process" or "constitutional rights to death benefits" or "taking of a constitutionally guaranteed property right without due process" were sufficient to show that a federal question was adequately presented below in state court was considered by this Court in *Webb v. Webb, supra* at pp. 496-497:

> "Although the petitioner did use the phrase 'full faith and credit' at several points in the proceeding below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution....
>
> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

This Court in *Webb v. Webb, supra* was also not impressed with the argument that since the Georgia State Constitution had

no full faith and credit clause, reference must have been to the Federal Constitution. Herein, however, Arizona does have a due process clause, *Article* 2 §4 of the *Arizona Constitution,* as well as a constitutional provision regarding taking of property without just compensation, *Article* 2, §17 of the *Arizona Constitution.*

This Court also felt it relevant in *Webb v. Webb, supra,* that the Petitioner did not claim in her peitition for rehearing before the Georgia Supreme Court that the Court's failure to reach the federal claim was error. Neither did the Petitioner herein. Nowhere in the petition for Review to the Arizona Supreme Court is such a contention made. This Court in *Webb v. Webb, supra,* concluded that the Petitioner therein had not raised her federal claim at any point in the State Court proceedings. After discussing both the "powerful policy considerations" to the statutory and rule requirements that a federal challenge to a state statute or other official act be first presented to the state courts, as well as other practical reasons therefor, the court futher concluded:

> "At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.
>
> "Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case. Accordingly, the court is dismissed for want of jurisdiction." *Supra* at pp. 501-502.

Although this court has expressed some concern for the lack of clarity in the "properly-raised-federal question" doctrine or the

"not pressed or passed upon below" rule, *See, Illinois v. Gates, supra; Webb v. Webb, supra,* this Court in *Street v. New York, supra* at p. 584, stated that the controlling principle was set forth in *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is regarded as having been adquately presented. (Footnote omitted.)"

It is abundantly clear that the Petitioner not only has failed in her burden of proving an adequately raised and considered federal question in the state courts below pursuant to both statutory and Supreme Court rule requirements, *Durley v. Mayo,* 351 U.S. 277 (1956), but also, the record itself shows that no federal issue was ever expressly raised and considered in the Arizona proceedings. Nor were they intended to be raised and considered below by the petitioner. It is only now that Petitioner first raises any federal contentions.

Neither can the Petitioner contend herein that the opinion of the Arizona Court of Appeals unexpectedly has given rise to a federal question that she had no previous opportunity to assert and could not have fairly anticipated. *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313 (1930). The Petitioner herein was notified at the outset that Respondents intended to extend the existing credit from the third-party recovery to her widow's benefits if granted. If she deemed this position, if sustained, to be violative of the Taking Clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment, she has every opportunity to raise the issue at each and every stage of the state proceedings. She failed, however, to raise it at *any* level prior to the petition for Writ of Certiorari herein. For these reasons, the petition for Writ of Certiorari should be denied.

II. The Opinion of The Arizona Court of Appeals Decided Only Issues Of State Law. Petitioner Attempts To Now Have This Court Grant A Writ of Certiorari To Review The Application Of State Law By The Arizona Court Of Appeals. Such A Review Would Only Be An Advisory Opinion Which this Court Does Not Allow.

As the foregoing illustrates, this Court has jurisdiction only if the federal question sought to be raised was adequately presented and considered in the Arizona State proceedings. State courts have long been held to be the appropriate tribunal for questions arising under state law and "...it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their ability to construe those laws correctly." *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590,626 (1875). Although there is no evidence herein that the Petitioner adequately raised a federal question in the Arizona State proceedings, even when federal grounds are raised in the State Court, this Court has consistently adhered to the principle that it will not review judgments of the State Courts that rest on adequate and independent grounds. The only power over state judgments is to correct them to the extent that they incorrectly decide federal rights. *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1954). There is no doubt herein that the Arizona proceedings, and, most importantly, the opinion of the Arizona Court of Appeals, from which review was denied by the Arizona Supreme Court, rested entirely upon State law. There is no ambiguity in the opinion or its rationale. The Arizona Court of Appeals was asked, by the Petitioner below only to consider whether the Petitioner's death benefits under State law that had not matured when the employee's and Petitioner's third-party claim against the tortfeasor was settled are subject to the statutory lien under the applicable state statute, A.R.S. §23-1023 and other state law. The Arizona Court of Appeals considered and decided each issue raised by the Petitioner. All involved application of Arizona statutory law, case law or Arizona Constitutional provisions.

In the Court of Appeals, the Petitioner first attempted to distinguish the State court decision in *Triste v. Industrial Com-*

mission, 25 Ariz. App. 489, 544 P.2d 706 (1976) relied upon by the Court of Appeals. The Court of Appeals considered the contentions and found not only that *Triste, supra,* was not factually distinguishable but also, that the facts in the instant case were even stronger for the extension of the lien to the widow's benefits. The Court of Appeals next considered the Petitioner's argument that *Triste, supra,* did not address the statutory interpretation arguments that she was now raising. The Court of Appeals decided that even though that was correct, the interpretation assumed in *Triste* was consistent with the general purpose of the lien statute to reimburse the carrier for its compensation expenditure and was, therefore, applicable herein. The Court of Appeals went on to consider Petitioner's arguments that the interpretation allowed conflicts with the wording of the relevant state statutes to find that since the widow participated in the third-party settlement, and compromised both her actual loss of consortium claims and her potential wrongful death claims, she settled her own claims, and, therefore, death benefits should be included in the compensation benefits that the lien offsets. Based upon appropriate State precedent, the Court of Appeals also refused the Petitioner's argument that death benefits should be excluded because they are not specifically included in A.R.S §23-1023.

The Court of Appeals considered the out of state authority cited by the parties but after finding that most rely upon dissimilar state statutes, concluded that Arizona laws are determinative.

The final contention considered was the Petitioner's argument that the application of the lien to the death benefits would violate *Article* 18, *Section* 8 of the *Arizona Constitution.* The Court of Appeals held that this constitutional provision only prohibits a reduction in percentages and amounts of compensation and that the lien or credit herein did neither.

Based upon the arguments presented, and applicable Arizona law the Arizona Court of Appeals affirmed the Industrial Commission Award. The Court of Appeals entirely considered and rendered its opinion based upon Arizona law.

In Arizona, rights and liabilities that flow from an industrial accident are entirely creatures of state statute. *Chevron Chemical*

Company v. Superior court, supra, 131 Ariz. at p. 437. The rights and liabilities created by statute can be limited by statute. The Arizona State courts likewise are the only courts that should interpret Arizona law unless some federal statutory or federal constitutional right has been infringed.

The Petitioner spends the first nine pages of her "Reasons For Granting the Writ" attempting to reargue exactly the same State law questions that were considered and ruled upon by the Arizona Court of Appeals. She also attempts to have this Court reconsider the authority from other state jurisdictions which the Arizona Court of Appeals found to be based upon dissimilar statutes and, therefore, not determative.

In essence the Petitioner herein seeks this Court to render an advisory opinion and should, therefore, not be contenanced.

III. The Application Of The Third-Party Lien Provision Of A.R.S. §23-1023(C) To The Petitioner's Death Benefits Under Workmen's Compensation Act As Found By The Arizona Court Of Appeals Does Not Constitute An Unlawful Taking Of A Right In Contravention Of The Taking Clause Of The Fifth Amendment To The United States Constitution.

As previously submitted, the Petitioner has failed to sustain her burden of proving that her contentions regarding the Taking Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment were adequately raised and considered in the Arizona State Court proceedings pursuant to both 28 U.S.C. Section 1257(3) and *Rule* 21.1(h) of the *Rules of the Supreme Court of the United States.* Therefore, her Petition for Writ of Certiorari should be dismissed. Her contentions now first raised to this Court should not be considered.

However, even if the Petitioner's contentions are considered, they are without merit. The Petitioner has not only misunderstood the application of the Taking Clause of the Fifth Amendment, but also has misunderstood the general purposes of workmen's compensation legislation and the third-party lien provision in question, A.R.S. §23-1023.

In all workmen's compensation statutes there is a legislatively created trade-off between the respective rights of the employee and the employer. The employee gains the right to prompt benefits without being required to show the employer's fault or meet common law defenses. On the other hand, the employee's recovery from the employer is limited to the terms of the compensation statute which usually means less total recovery than he may have been entitled to under common law theories. In most other respects, the employee is provided a greater degree of protection that under the common law. Generally, once a workmen's compensation act becomes applicable, it affords the exclusive remedy to the injured employee or his dependents against the employer. This is the *quid pro quo* for the trade-off for allowing the injured worker benefits without providing fault. *Larson, Workmen's Compensation* (Desk Ed.), §65.10. Workmen's compensation basic underlying theory is different form the common law remedies — social protection rather than righting a wrong. It affords a method of placing the cost of such a program through the employer to the industry as a whole. These state-created compensation schemes are designed to provide dependents of a deceased worker a means of recovery for his often abrupt and accidental death while at work. *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, 171 (1972).

In essence, workmen's compensation acts are legislative-created systems where certain common law rights and liabilities are changed for the public good through the state's respective police powers to prevent workers injured without any fault of the employer from becoming wards of the public. This Court has consistently recognized the power of state legislatures to define the public needs, *Berman v. Parker,* 348 U.S. 26 (1954) as well as limit rights of recovery; for government could hardly continue "if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393, 413 (1922).

In the early case of *New York Central R.R. v. White,* 243 U.S. 188 (1917) this Court considered an employer's attack on the constitutionality of New York's Workmen's Compensation Act which required him to pay death benefits to dependents of a

worker killed at his place of employment without regard to fault. The employer's attacks included the contention that the compulsory compensation scheme was repugnant to the due process clause of the Fourteenth Amendment. Justice Pitney writing the opinion of this Court, went through a thorough analysis of the legislative power to define and limit rights and liabilities in the proper occasion. After recognizing the close relation of the rules governing responsibility between employer and employee to the fundamental rights of liberty and property, he stated:

> "But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist it shall remain unchanged for his benefit." [citations omitted] 243 U.S. at p. 198

After discussing the common law bases of liability and guides of conduct, this Court found that they are subject to change in the exercise of the sovereign authority of the state. The New York statute considered was found to be a reasonable exercise of the police power of the State:

> "...in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." 243 U.S. at p. 207

This Court concluded that the New York scheme of compulsory compensation was not repugnant to the Fourteenth Amendment.

Now, all the states of the United States have adopted Workmen's Compensation Acts. *Larson, Workmen's Compensation* (Desk Ed.) §5.30. All have created and defined statutory rights and liabilities and either limited or eliminated others. One common area of limitation is in the area of third-party actions. When a compensable work-related injury is the result of a third person's tortious conduct, all state statutes but two preserve a right against

the tort-feasor since the compensation system was not designed to protect strangers. It is elementary that if a stranger's negligence was the cause of the injury to the claimant in the course of his employment, he should not be absolved from his normal obligations to pay damages for such an injury. *Larson, Workmen's Compensation* (Desk Ed) §§71.00, 71.10

Since it is equally elementary and fair that the injured worker should not be allowed to keep the entire amount of both compensation under applicable workmen's compenstation provisions and all of the third-party common-law damage recovery, all but two state legislatures have created statutory lien provisions such as A.R.S. §23-1023, to allow the employer, insurance carrier or the party ultimately liable for the compensation, a lien or credit on the third-party recovery to the extent of benefits paid or responsible for. Professor Larson in his noted treatise sets forth the rationale:

> "This is fair to everyone concerned: the employer, who, in fault sense, is neutral, comes out even; the third person pays exactly the damages he would normally pay, which is correct, since to reduce his burden because of the relation between employer and employee would be a windfall to him which he has done nothing to deserve; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone." *Larson, Workmen's Compensation* (Desk Ed.) §71.20

The basic theory is to prevent a double recovery or a windfall. *Holder v. Industrial Commission,* 125 Ariz. 366, 609 P.2d 1066 (App. 1980). The Arizona legislature has retained the common-law right in the employee or, if killed, his dependents to pursue his remedy against a third party if such third party injures or kills the employee. A.R.S. §23-1023(A)

A.R.S. §23-1023(C) also provides in part:

> "If he proceeds against such other person, compensation and medical surgical and hospital benefits shall be paid as provided in this Champter and the insurance carrier or other

person liable to pay the claim shall have a lien on the amount actually collectible from such other person to the extent of such compensation and medical, surgical and hospital benefits paid..."

The Arizona Court of Appeals herein considered the Petitioner's contentions that the statutory lien created therein applied to only the compensation benefits of the injured employee and not to his widow. Relying upon the statutory wording as well as the state legal precedent in *Triste v. Industrial Commission, supra,* the Arizona Court of Appeals held that since the Petitioner participated in the third-party settlement and compromised both her actual loss of consortium claims and her potential wrongful death claim, death benefits should be included in the compensation benefits that the lien offsets.

This extension of the lien to the death benefits herein is what the petitioner seeks to have this Court review and, ultimately, find repugnant to the Taking Clause of the Fifth Amendment to the United States Constitution. "The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: 'Nor shall private property be taken for public use; without just compensation.' That provision, of course applies against the States through the Fourteenth Amendment." *Chicago, B. &.Q. R. Co. v. Chicago,* 166. U.S. 226, 239 (1897).

However, Petitioner's arguments are misplaced. As previously discussed herein, a state possesses under its police power, the ability to regulate rights and liabilities without payment of compensation. Only if the regulation goes too far can there be an unconstitutional taking of property without just compensation. It must also be remembered that a person does not have a vested property right in a measure of damages or right of law entitling him to benefits. *New York Central R.R. v. White, supra* at p. 198. "Nor does an expectation of public benefits confer a constitutional right to receive the expected amounts." *Richardson v. Belcher,* 404 U.S. 78, 80 (1971). Therefore, no property right has been interfered with at all.

This Court has admitted on numerous occasions that there are no general rules or set formulas that apply when the Taking

Clause is considered. *Williams D. Ruckelshaus v. Monsanto Company,* 52 U.S. L.W. 4886, 4889 (1984). It is essentially an "ad hoc, factual" inquiry. *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 124 (1977). There have been several factors identified: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; the character of the governmental action. *Penn Central Transportation Company v. New York City, supra; William D. Ruckelshaus v. Monsanto Company, supra; Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980).

Applying these factors to the instant case clearly shows that there is no "taking" of a constitutionally protected property right. First, in considering the character of the governmental action, it is apparent, as previously set forth herein, that third-party lien provisions are a proper exercise of a state's police power in the interest of the public good. Nothing is taken from anyone — merely one form of recovery has been in part created and another limited for the purpose of preventing double recovery. This Court has upheld Social Security offsets of the employee's Workmen's Compensation benefits so as to prevent a double recovery. *Richardson v. Belcher, supra.*

The injured worker or, in this case, his dependents receive as much as he can under either system — i.e., either from his third-party recovery or his common-law recovery. The third-party lien statute only prevents a double recovery. Certainly, this is within the police power of the state. In this case the argument is not any less persuasive since the Petitioner participated in the settlement of the third-party action and released all her independent causes of action. The Petitioner has continued to argue throughout the proceedings that she was only a nominal party to the third-party action and eventual settlement. However, there was no evidence ever presented that she did not benefit from or share in the proceeds of this third-party recovery. Therefore, the third-party recovery was the only fund from which the Respondents herein could recover their liability for workmen's compensation benefits both to the injured worker and the Petitioner.

Neither was the Petitioner deprived of her death benefits under

the Arizona Act. It is clear from the proceedings below that she was granted dependent's benefits. The existing credit merely prevents recovery until it is exhausted.

Although the petitioner attempts to invoke the sympathy of this Court, there is no evidence that there was any adverse economic impact upon the Petitioner. Again, she was allowed to recover as much as she could under either system, common-law or statutory, just not under both. She agreed to release her common-law rights.

Finally, Petitioner had no investment-backed expectations that have been impaired or deprived herein. A dependent certainly should not enjoy any greater degree of benefits than the injured worker.

The Taking Clause was designed to bar the government from forcing some people alone to bear public burden and responsibilities which should be born by the public. *Armstrong v. United States,* 364 U.S. 40, 49 (1960). The third-party lien statute herein applies to all workers and all dependents. In third-party lien statutes such as herein, not only is nothing taken from the injured worker or his dependents, the public good is fostered by keeping the cost of such social legislation down. This is especially important where an employer is by statute asked to assume a liability caused by an outsider or stranger.

Since there was no taking herein, it is unnecessary to discuss the "just compensation" contentions of the petitioner. This Court has said that the constitutional guarantees of just compensation is not a limitation on the power of eminent domain but only a condition of its exercise. *Long Island Water Supply Company v. Brooklyn,* 166 U.S. 685, 689 (1897).

The Petitioner has failed to show that the state statutes herein, as applied by the Industrial Commission of Arizona and affirmed by the Arizona Court of Appeals constituted a prohibited taking so as to justify Federal Constitutional protection herein. Failing to sustain her burden, she finally attempts to invoke the sympathy of this Court by "the human tragedy involving the denial of death benefits to a widow." She forgets she was granted death benefits. She also attempts to create the illusion that she was left destitute by the action below. There is absolutely no evidence of that. Such

attempts of sympathy should not be countenanced.

For the reason submitted, the Petitioner's Petition for Writ of Certiorari should be denied by this Honorable Court.

CONCLUSION

The Petitioner has failed to show pursuant to both 28 U.S.C. Section 1257(3) and *Rule* 21.1(h) of the *Rules of the Supreme Court of the United States* that the federal claim that she now petitions this Court to review was adequately raised and considered in the state court proceedings herein. The Petition for Writ of Certoriri should be denied on that basis alone. *Rules* 21.5, 33.7, *Rules of the Supreme Court of the United States.* If the record below is reviewed, it clearly shows that the Petitioner never did raise the Taking Clause of the Fifth Amendment or any federal constitutional issue or contention at any stage in the state court proceedings.

The record also clearly reflects that the proceedings below, including the opinion of the Arizona Court of Appeals, rested on entirely state grounds. Any review by this Court would be an advisory opinion which this Court does not allow.

Finally, should this Court actually consider the Petitioner's contentions regarding the Taking Clause of the Fifth Amendment, this Court should deny the Petition for Writ of Certiorari because the application of the Arizona third-party lien provisions of A.R.S. §23-1023(C) to the Petioner's death benefits under the Arizona Workmen's Compensation Act does not constitute taking in contravention to the Fifth Amendment's Taking Clause.

For these reasons, the Petition for Writ of Certiorari should be denied; if review is granted, the Arizona Court of Appeals should be affirmed.

Respectfully submitted,

STATE COMPENSATION FUND
ROBERT K. PARK, Chief Counsel

George B. Morse

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P.O. Box 5686
Tucson, Arizona 85703

APPENDIX A

FLORENCE E. MANNEL,
Petitioner,

I CA-IC 3021

v.

DEPARTMENT B

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

O P I N I O N

DEPARTMENT OF TRANSPORTATION,
Respondent Employer,

STATE COMPENSATION FUND,
Respondent Carrier.

Special Action—Industrial Commission
ICA CLAIM NO. 454-12-6153
CARRIER NO. 78-34366
Administrative Law Judge Jerry C. Schmidt
AWARD AFFIRMED

Rabinovitz, Dix & Rehling, P.C.
by Bernard I. Rabinovitz
Attorneys for Petitioner — Tucson

Sandra Day, Chief Counsel
The Industrial Commission of Arizona
Attorney for the Respondent — Phoenix

Robert K. Park, Chief Counsel
State Compensation Fund
by James F. Crane
Attorneys for Respondents Employer & Carrier — Tucson

GREER, Judge

This is a special action review of an Industrial Commission award granting death benefits, but subjecting them to the compensation insurer's credit from an A.R.S. § 23-1023 lien on specified proceeds from the employee's settlement of his claim with the third party tortfeasor. The issue presented is whether present death benefits that had not matured when the employee's third party claim against the tortfeasor was settled are subject to the credit. We hold that the benefits are subject to the credit, and therefore affirm the award.

The petitioner (wife or widow) is the only dependent of the deceased employeee. In September, 1978, the employee suffered a compensable industrial injury caused by negligent third parties. The employee successfully claimed worker's compensation benefits, and he and his wife sued the third parties.[1] The parties subsequently settled, released the third party tortfeasors from all present and future claims,[2] and received the settlement proceeds. The compensation carrier approved the settlement, received reimbursement of compensation already paid to the employee ($24,655.57), and reserved a credit against future liability

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[1]The complaint alleged that "the plaintiff has sustained severe and permanent injuries; has undergone and will continue to undergo medical treatment and expense, has suffered and will continue to suffer indefinitely in the future from pain, suffering, aggravation, inconvenience, and in addition, has suffered wage losses in the past and a loss of earning and earning capacity in the future." It sought "compensatory damages to reasonably and justly compensate plaintiffs for their losses," punitive damages, costs, and other relief.

[2]The release applies to "all claims, actions, causes of action, claims for relief, claims for loss of consortium, demands, rights, damages, costs, expenses or compensation whatsoever which [they] now have or may have on account or in any way growing out of the personal injuries sustained by [the employee] . . . ." It also acknowledges that the employee "may have sustained injuries that are presently unknown to him or anyone else and that there may be unforeseen consequences for both such known and unknown injuries and it is [their] express intention. . . that all such injuries and potential injuries and potential consequences thereof are covered by and included in this release."

($90,194,70),[3] which credit would diminish as the worker's benefits accrued.

After this settlement and approval, the employee's disability benefits countinued to accrue, and the compensation carrier applied them to reduce the credit. In April 1982, the employee died. The employee's right to future disability benefits ceased, but the widow's right to death benefits matured. A.R.S. § 23-1045(B), A.R.S. § 23-1046. The credit balance was then approximately $79,000.

The widow claimed death benefits. The compensation carrier denied the claim, and in the alternative subjected the death benefits to the outstanding credit. At the scheduled hearings, the widow established that the industrial injury caused the employee's death. She also testified that she did not know how much of the original settlement proceeds remained, but that what remained was hers by right of survivorship. The administrative law judge issued the award granting death benefits, but subjecting them to the credit. The award was affirmed on administrative review, and this special action followed.

A.R.S. § 23-1023 states, in relevant parts:

> A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.
>
> * * *

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[3]There are two approval agreements. Concerning the compensation carrier's credit, the first states that the satisfaction of the carrier's lien "is not intended to and does not affect the rights or obligations of [the employee, his employer, and the compensation carrier] under the workmen's compensation laws of this state as to future benefits that may be due to [the employee]... or future credits that may be due [the compensation carrier and the employer]...." The second states that this credit "shall apply to all heretofore incurred but unpaid medical benefits and disability compensation, if any, and to all future medical benefits and disability compensation for which [the carrier] may become liable by virtue of a Notice of Claim Status issued by [the carrier], or an award of the Industrial Commission of Arizona."

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid.

These subsections concern the same subject; they therefore are interpreted as a whole. *Talley v. Industrial Commission,* 1 CA-IC 2809 (Ariz. App. Aug. 16, 1983). The general purposes of this statutory lien are to require the third party to pay what he would normally pay if there were no workers' compensation, to reimburse the carrier for its compensation expenditure, and to allow the compensation beneficiary to enjoy the excess of the damage recovery over compensation. 2A A. Larson, *Workmen's Compensation Law* § 74.16(a) (1983). This statutory lien is an exception to the general rule that an insurance company may not be an assignee or a subrogee of its insured's tort claim. *Talley v. Industrial Commission,* slip op. at 5-6. The statutory terms determine whether a lien is allowed. *Sunstate Equipment Corp. v. Industrial Commission,* 135 Ariz. 477, 662 P.2d 152 (App. 1983). If a lien is allowed, it applied to the entire third party recovery (less expenses and attorney's fees), even though this recovery includes damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouse's loss of consortium). *Liberty Mutual Insurance Co. v. Western Casualty & Surety Co.,* 111 Ariz. 259,527 P.2d 1091 (1974).

The hearing judge relied on *Triste v. Industrial Commission,* 25 Ariz. App. 489, 544 P.2d 706 (1976) as authority for the award. The widow contends that *Triste* is not controlling due to factual differences and new arguments that she raises which were not addressed in *Triste.*

In *Triste,* the carrier was entitled to have its death benefit obligation offset by a § 23-1023 lien on settlement proceeds. The deceased employee had had a compensable back injury, but while undergoing surgery for it suffered a cardiac arrest. He was comatose for over three years until he died. Before his death, his wife

sued for medical malpractice in the capacity of his guardian and next best friend of the minor children. With the compensation carrier's consent, she settled and executed a general release for all present and future claims. After the employee died, the wife and her minor children claimed workers' compensation death benefits. Benefits were granted, but offset by a lien on the settlement proceeds. On review, the claimants conceded that the lien properly applied to offset the widow's death benefits and would properly apply to offset the children's, provided the children were properly represented in the third party settlement; claimants argued the children were not properly represented. The court rejected the challenge to the representation and affirmed the award.

The widow argues that *Triste* is factually different. She contends the third party suit in that case must have involved a wrongful death claim because the children otherwise had no separate claim for relief. It is true that children do not have a separate claim, *Jeune v. Del E. Webb Construction Co.*, 77 Ariz. 226, 269 P.2d 723 (1954), *overruled on other grounds* 108 Ariz. 582, 503 P.2d 803 (1973) (recognizing spouse's claim for loss of consortium), however it does not follow that the children sued the third party for wrongful death. The children had potential wrongful death claims. A valid compromise of those claims subjected their subsequently matured death benefits to the lien credit: "[I]f the settlement was a valid compromise of the *potential* claims of the children, then the carrier would be entitled to set off the net amount of the settlement proceeds after deducting the expenditures for the deceased against its obligation for payment of death benefits." *Triste v. Industrial Commission,* 25 Ariz. App. 491, 544 P.2d 708 (emphasis added).

Triste therefore is not factually distinct. Here the widow also had a potential wrongful death claim which she compromised. The case at bar is even stronger, because unlike the children in *Triste,* here the widow had an *actual* claim for loss of consortium when the claim was settled.

The widow next argues that *Triste* did not address the statutory interpretation arguments that she now presents. We agree. *Triste resolved only the narrow question of whether the children's*

claims were effectively compromised. Although it did not address her agruments, it assumed a rule contrary to the widow's position. Triste interpreted § 23-1023(C) to give the compensation carrier "a lien in the amount actually collectible from the [third party tortfeasor] to the extent of the carrier's obligation for *compensation benefits." Triste v. Industrial Commission,* 25 Ariz. App. 491, 544 P.2d 708 (1976) (emphasis added). Compensation benefits include medical benefits, disability benefits, and death benefits. *See* A.R.S. § 23-901(4). Furthermore, this interpretation is consistent with the general purpose of the lien statute to reimburse the carrier for its compensation expenditure.

The widow argues that this interpretation conflicts with the terms of § 23-1023. She relies on the general principle that disability benefits are distinct from death benefits. We agree that benefits are an independent statutory right that do not derive from the decedent. A worker's compromise of his rights to workers' compensation medical expenses and disability benefits does not affect the rights of his dependent's death benefits. *See, e.g., Kay v. Hillside Mines, Inc.,* 54 Ariz. 36, 91 P.2d 867 (1939); accord 2 A. Larson, *supra,* § 64. We disagree, however, that this general principle supports the widow's statutory interpretation arguments.

The widow first argues that the lien applies to only the employee's third party recovery because subsection (A) allows only the injured employee to "pursue *his* remedy against such other person." A.R.S. § 23-1023(a) (emphasis added). This interpretation of "his" ignores the immediately preceding phrase referring to the employee's dependents if he should die.[5]

Additionally, the widow's interpretation is anomalous because the injured employee and his dependents may have simultaneous civil remedies: a survival action brought by the personal representative for the decedent's estate, *see In Re Estate of Milliman,* 101

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[5]Section 23-1023(B) makes the intended reference clear: "if the employee entitled to compensation under this chapter, or his dependents, does not pursue *his or their* remedy against such other person ...." A.R.S. § 23-1023(B) (emphasis added).

Ariz. 54, 415 P.2d 877 (1966); *Barragan v. Superior Court,* 12 Ariz. App. 402, 470 P.2d 722 (1970), and a wrongful death action brought in the name of the personal representative or the surviving spouse for the benefit of the statutory beneficiaries, *see* A.R.S. §§ 12-611, 12-612, 14-3110. Both may have simultaneous claims for workers' compensation: the deceased employee's estate for benefits that accrued while the deceased was alive, *see Reed v. Industrial commission,* 104 Ariz. 412, 454 P.2d 157 (1969), and the dependents for death benefits, *see* A.R.S. § 23-1046.

The widow next argues that if only the injured employee pursues his third party claim, the lien applies to offset his benefits only. First, this argument ignores the fact that the injured employee's third party recovery precludes the dependent's independent wrongful death recovery. *See e.g., Mellon v. Goodyear,* 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928).[6] Second, the employee's third party recovery is the only fund from which the compensation carrier can be reimbursed for its compensation payments. The widow's argument would be persuasive if the dependents had a viable wrongful death claim. In that case, the carrier would have a separate fund for reimbursement for death benefits. *Cf. Roberts v. All American Engineering Co.,* 104 N.J. Super. 1, 248 A.2d 280 (1968) (lien applied only to employee's benefits because widow was not a party to the third party settlement and had a viable wrongful death claim). However, in the present case the widow participated in the third party settlement, and compromised both her actual loss of consortium claims and her potential wrongful death claim. The effect of the settlement is to settle her claims.

The widow next argues that if only the injured employee is receiving compensation benefits when the Claim is settled, the lien applied to offset his benefits only because subsection (C) allows the lien "to the extent of *such* compensation and medical, surgical and hospital benefits paid." A.R.S. § 23-1023(C) (empha-

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[6]This rule has been criticized. *See, e.g., Sea-Land Services Inc. v. Gaudet,* 414 U.S. 573, 94 S. Ct. 806, 39 L. Ed.2d 9 (1974) (refusing to extend traditional rule to maritime law). *See generally* 25A C.J.S. Death § 47(b) (1966).

sis added). She interprets the word "such" to refer to the compensation benefits paid to the compensation beneficiary when the third party claim was settled. Although this is a possible interpretation, we disagree that it is the most natural one.

The predecessor to the current 23-1023 required the claimant to elect between his civil remedy and workers' compensation. *See, e.g.,* Laws 1925, Ch. 83. § 66. The current version eliminates this election and requires the carrier to pay "compensation and medical, surgical and hospital benefits...as provided in this chapter...." A.R.S. § 23-1023(C). The revision provides for the compensation carrier's reimbursement by giving it "a lien on the amount actually collectable from such other person [the third party] to the extent of such compensation and medical, surgical and hospital benefits paid." A.R.S. § 23-1023(C). Because the carrier is required to pay all compensation, including death benefits, even if the third party claim is pursued, death benefits should be included in the compensation benefits that the lien offsets.

The widow also argues that any ambiguity in § 23-1023 should be resolved in her favor to achieve the remedial purpose of the workers' compensation law. One purpose of § 23-1023, however, is to reimburse the compensation carrier for its expenditure.

The issue was raised at oral argument that death benefits should be excluded from § 23-1023 because they are not specifically included in the statute. In *Hornback v. Industrial Commission,* 106 Ariz. 216, 474 P.2d 807 (1970), the Arizona Supreme Court recognized that absent carrier approval of a third party settlement, a worker was not entitled to reopen his claim and thereby receive additional benefits, even though the original settlement was for $10,000, whereas the benefits awarded were only accident benefits and $266.06. The supreme court rejected the worker's argument that since the settlement exceeded the compensation benefits, carrier approval was unnecessary because the carrier had no interest in the settlement, not being liable for any deficiency in the settlement.

The supreme court was unable to accept the worker's argument because it ignores the fact that the employee in this action is seeking to reopen his claim and seek more compensation.

106 Ariz. at 220. The supreme court's reasoning implies that carrier approval of a third party claim is a prerequisite to reopening because the carrier is entitled to protect its subrogation rights to "all rights of the employee against a third party tortfeasor," *id.* at 219, including those rights which would reimburse reopening benefits. This is so even though § 23-1023 does not specifically mention reopening benefits. Since the supreme court recognizes a carrier's interest in protecting its lien to reimburse the carrier's liability for reopening benefits, we cannot say that the carrier lacks an interest in the settlement for reimbursement of death benefits.[7]

We recognize conflicting out-of-state authority on this question.[8] Some cases rely on dissimilar statutes. *E.g., Transcontinental Insurance Co. v. Walsh,* 621 S.W.2d 461 (Tex. App. 1981) (statute applied the lien to third party recovery by "a workman's compensation beneficiary...entitled to compensation...."). Others are less obviously distinguishable, *see, e.g., Cresci v. Mike Krasilousky Trucking Co.,* 172 N.Y.S.2d 322 (1958), and often rely on the distinction between disability and death benefits, *see generally* 2A A. Larson, *supra,* § 23-1023, however Arizona laws and not out-of-state authority, are determinative.

Finally, the widow argues that the application of a § 23-1023 lien to offset death benefits violates the Arizona constitutional provision on workers' compensation. *See* Ariz. Const. Art. 18, §

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[7]A. Larson (2A A. Larson, *Workmen's Compensation Law,* §§ 71.20, 74-16(a) (1983)) recognizes that the objectives of a good workmen's compensation statute are many and varied, and "with all these balls to be kept in the air at the same time, it is perhaps not surprising that a few statutes have perfectly performed this juggling act." § 74.16 at 14-355.

[8]Other cases are consistent. *E.g., Richardson v. U.S.F. & G., 102 So.2d 368 (Miss. 1958).*

8.[9] This paragraph prohibits a reduction in the percentages and amounts of compensation provided in the original worker's compensation act. *See Atkins v. Industrial Commission,* 95 Ariz. 239, 389 P2d 118 (1964). The widow's death benefits have not been reduced; she is credited with the full amount allowed by A.R.S. § 23-1046. The compensation carrier, however, is not required to make an actual payment of death benefits until the credit is exhausted.

For the foregoing reasons, the award is affirmed.

D.L. GREER, Judge

CONCURRING:

BRUCE E. MEYERSON
Presiding Judge, Department B

DONALD F. FROEB, Judge

[9]Article 18, section 8 states in relevant part:

The percentages and amount of compensation provided in House Bill No. 227 enacted by the Seventh Legislature of the State of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated except by initiated or referred measure as provided by this Constitution.

APPENDIX B

RE: FLORENCE L. MANNEL vs.
INDUSTRIAL COMMISSION et al
Supreme Court No. 17621-PR
Court of Appeals No. 1 CA-IC 3021
Industrial Commission No. 454-12-6153

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 13, 1984, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 14th day of September 1984.

S. ALAN COOK, Clerk

TO: Bernard I. Rabinovitz, Esq.
Sandra Day, Esq., Chief Counsel, Industrial Commission
Robert F. Park, Esq., Chief Counsel, State Compensation Fund
James F. Crane, Esq., State Compensation Fund, Tucson
Glen D. Clark, Clerk, Court of Appeals, Division One

APPENDIX C

FLORENCE E. MANNEL, *Petitioner,*	Supreme Court No. 17621-PR
vs.	Court of Appeals No. 1 CA-IC 3021
THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*	Industrial Commission No. 454-12-6153
DEPARTMENT OF TRANSPORTATION, *Respondent Employer,*	
STATE COMPENSATION FUND, *Respondent Carrier.*	

ORDER

IT IS ORDERED that Petitioner's "Motion for Permission to File Motion for Reconsideration" is denied.

DATED this 2nd day of October, 1984.

WILLIAM A. HOLOHAN
Chief Justice

TO: Bernard I. Rabinovitz, Esq., Rabinovitz, Dix & Rehling, 721 N. 4th Ave., Tucson, AZ 85705
James Crane, Esq., State Compensation Fund, 55 E. Helen St., Tucson, AZ 85705
Sandra Day, Chief Counsel, Industrial Commission of Arizona, P.O. Box 19070, Tucson, AZ 85005
Robert K. Park, Chief Counsel, State Compensation Fund, P.O. Box 6769, Phoenix, AZ 85005

APPENDIX D

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

THE ESTATE OF
HOWARD MANNEL, *Deceased,*
FLORENCE E. MANNEL, *Widow,*
Applicant,

vs.

DEPARTMENT OF
TRANSPORTATION
Defendant Employer,

STATE
COMPENSATION FUND,
Defendant Insurance Carrier

ICA Claim No. 454-12-6153
Carrier Claim No. 78-34366
Date of Injury: 9-21-78

DECISION UPON HEARING
AND FINDINGS AND AWARD
GRANTING
WINDOW'S CLAIM FOR
DEATH BENEFITS AND
FOR LIEN PURSUANT
TO A.R.S. §23-1023

Heretofore, on October 12, 1978, Howard Mannel, the deceased, filed a claim for workmen's compensation benefits for an industrial injury sustained while employed by the above-named defendant employer on September 21, 1978.

The defendant insurance carrier herein accepted Mr. Mannel's claim and on September 2, 1981 issued a NOTICE OF CLAIM STATUS asserting its lien against third party settlement. On May 14, 1982 Florence Mannel, the widow and applicant herein, filed a claim for death benefits for the death of her husband on April 16, 1982. On June 4, 1982 the defendant insurance carrier denied the applicant's claim.

Thereafter, on August 13, 1982 the applicant filed a REQUEST FOR HEARING and pursuant thereto, formal hearings were held in Tucson, Arizona on January 3, 28 and February 7, 1983. The applicant is represented by Mr. Bernard I. Rabinovitz and the defendant insurance carrier is represented by Mr. James F. Crane.

The undersigned, having fully considered the file, records and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On September 21, 1978 Howard Mannel sustained an industrial injury while employed by the above-named defendant employer who at said time was insured under the provisions of the Arizona Workmen's Compensation Act against liability for the payment of medical, surgical, hospital and/or compensation benefits. The applicant herein entered into an agreement to compromise and settle a third party claim which arose out of the subject industrial episode for the sum of $160,000.00. The State Compensation Fund approved the settlement and received the sum of $24,655.57 in complete payment of its claim lien to that point and asserted a credit against the payment of any further compensation, medical, surgical and hospital benefits.

2. On September 21, 1978 Howard Mannel was checking the temperature of a truck load of hot asphalt when the truck lurched forward causing him to fall into the material. Mr. Mannel quickly removed himself avoiding any burns and in the process sustained

a strain of the right shoulder and neck.
Within a short time of that episode Mr. Mannel began experiencing extreme shortness of breath which increased in intensity and resulted in his seeking medical attention. He was found to be in atrial fibrillation and underwent cardioversions. The applicant's symptoms persisted and it was ultimately determined that he had sustained a ruptured Chordea tendonea of the mitral valve causing mitral valve insufficiency. Mr. Mannel's physical condition progressively deteriorated resulting in several hospitalizations and installation of a pacemaker. Mr. Mannel's condition was essentially inoperable and he was totally disabled. In the last month or so before his death his wife observed a change in his complexion and testified that he spent most of his time sleeping and that he was having more difficulty than he had previously with shortness of breath. On April 16, 1982 Mr. Mannel died a sudden death in a barber's chair while having a haircut. At the time of his death there was a credit still in existence in the sum of approximately $79,000.00.

3. Board certified cardiologist, John Carroll, M.D., testified that he first saw the deceased in 1973 in consultation and did not see him again until 1979 when he appeared with complaints of sudden shortness of breath and irregularity of heartbeat. Dr. Carroll testified regarding his findings upon examining the applicant as well as his treatment thereafter for mitral valve insufficiency. Dr. Carroll testified during the year prior to Mr. Mannel's death he observed a progressive deterioration of his physical condition. It was Dr. Carroll's opinion that Mr. Mannel died of sudden cardiac arrhythmia ventricular fibrillation. Dr. Carroll testified further that it was his opinion within a reasonable degree of medical probability that Mr. Mannel's sudden death was the result of the industrial injury, treatment and medication.

4. Board certified cardiologist, Richard McCarty, M.D., testified regarding his findings upon examining Mr. Mannel in June 1979. It was Dr. McCarty's opinion that Mr. Mannel had sustained a ruptured mitral valve Chordea Tendonae as a result of the industrial accident of September 21, 1978. In response to a lengthy hypothetical setting forth the history of Mr. Mannel's physical deterioration and death following Dr. McCarty's exami-

nation, Dr. McCarty responded that there was no doubt in his mind that the sudden death was causally related to the mitral valve insufficiency which was contributed to by the subject industrial episode of September 1978.

5. Board certified cardiologist, Brendan Phibbs, M.D. testified to his findings upon examining the applicant in June 1981. In response to questions concerning the cause of Mr. Mannel's sudden death Dr. Phibbs stated that he was unable to respond because no autopsy had been performed and that there were a number of "things" or "diseases" which could cause sudden death.

6. An applicant seeking to recover death benefits has the burden of proof by a preponderance of the evidence to establish all of the material elements of her claim, *Russell v. Industrial Commission,* 104 Ariz. 548, 456 P.2d 918 (1969). The term preponderance was defined by the Court of Appeals in *Brooks v. Industrial Commission,* 24 Ariz. App. 395, 539 P. 2d 199 (1975) as follows:

> "Preponderance of the evidence means such evidence as when weighed with that opposed to it has more convincing force, and from which it results that a greater probability is in favor of the party upon whom the burden rests. It does not necessarily depend upon the number of witnesses; it merely means that the testimony which points to one conclusion appears to the trier of facts to be more credible than the testimony which points to the opposite one. The capacity of the submitted testimony to enforce belief on the arbiter to whom it is submitted is the touchstone of preponderance as applied to the testimony of witnesses." (Citations omitted)

7. Under the Workmen's Compensation Act two independent and separate rights of recovery exist, the one of the workman during his lifetime and the other of his dependents after his death, *Kay v. Hillside Mines, Inc.,* 54 Ariz. 36, 91 Pac. (2d) 867 (1939). In the instant case the applicant must establish a causal relationship between the industrial injury and the decedent's ultimate demise. *Brown v. Industrial Commission,* 20 Ariz. App. 486, 513 P.2d 1369 (1973). Moreover, such facts pertaining to medical causation must be established to a reasonable medical probability or

certainty, *Micucci v. Industrial Commission,* 108 Ariz. 194, 494 P.2d 1324 (1972). The Industrial Commission cannot find such a relationship based upon mere possibilities, *Gronowski v. Industrial Commission,* 81 Ariz. 363, 306 P.2d 285 (1957) or where the medical evidence is fraught with uncertainty, *Cross v. Industrial Commission, 81 Ariz. 222, 303 P.2d 710 (1956). Where there exists a conflict in the expert medical evidence it is the responsibility of the Administrative Law Judge to resolve it, Walters v. Industrial Commission,* ____ Ariz. ____ (Ct. App.) ____ P.2d ____ (1 CA-IC 2720, 12/21/82).

8. In the instant case although Dr. Phibbs could not offer an opinion regarding the cause of the death of Mr. Mannel, there nevertheless exists a conflict between the experts, *State Compensation Fund v. Industrial Commission,* 24 Ariz. App. 31, 535 P.2d 623 (1975). This conflict is resolved by adopting the opinions of Drs. Carroll and McCarty as being more probably correct. The preponderance of the evidence establishes that the demise of Howard Mannel was within a reasonable degree of medical probability caused by the subject industrial episode and resultant injury.

9. A.R.S. §23-1023 sets forth the liability of third persons to injured employees and provides:

> "A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.
>
> "...
>
> "C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery.

> The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

Under the statutory provision an injured employee may sue a third party and collect workmen's compensation benefits, however, the employer or the employer's carrier has a lien on the amount the employee receives from the third party to the extent of the benefits the employer is required by law to provide, *Chevron Chemical Co. v. Superior Court,* 131 Ariz. 431, 641 P.2d 1275 (1982). Such third party settlement agreements are subject to the written approval of the defendant insurance carrier, *Liberty Mutual Insurance Company v. Western Casualty and Surety Company,* 111 Ariz. 259, 529 P.2d 1091 (1974). The doctrine of equitable subrogation is founded on principles of equity and its purpose is a prevention of injustice and it is adopted by equity to compel ultimate payment of a debt by one who in justice and good conscience ought to pay it. *Kilpatrick v. Superior Court,* 105 Ariz. 413, 466 P.2d 18 (1970). The purpose of the subrogation provision is to compensate the employer and the insurance carrier to some extent for the additional liability they assume under the Workmen's Compensation Act for wrongful acts of independent third party tort-feasors, *Fisher v. Missoula White Pine Sash Company,* 518 P.2d 795 (Montana, 1974).

10. The question presented is whether the defendant insurance carrier given the circumstances of the settlement with the third party is entitled to set off the settlement proceeds against the death benefits due to the applicant/widow. On July 13, 1981 the decedent and his surviving spouse entered into an "Agreement to Compromise and Settle Claims and Release of all Claims" which provided in part:

> "...(D)o hereby for themselves, their heirs, executors, administrators, successors and assigns, release, acquit,

exonerate and forever discharge...(the third party)...of and from any and all claims, actions, causes of action, claims for relief, claims for loss of consortium, demands, rights, damages, costs, expenses or compensation whatsoever which the undersigned now have or may have on account of or in any way growing out of the personal injuries sustained by Howard M. Mannel on or about September 21, 1978..."

The agreement set forth the knowledge of the decedent and his surviving spouse that the injuries were permanent, progressive and disabling in nature and that he may have sustained injuries which were presently unknown at the time of entering into the agreement and that there "may be unforseen consequences for both such known and unknown injuries". The agreement proceeded to release the third party for all "such injuries and potential and potential consequences".

11. There appears to be only one Arizona case similar in nature to the issue presented and it admittedly has nominal distinctions. In *Triste v. Industrial Commission,* 25 Ariz. App. 489, 544 P.2d 706 (1976) the Court was called upon to determine whether the Commission correctly decided that the carrier, given the circumstances of a settlement with a third party was entitled to set off the settlement proceeds against the death benefits due for children of a deceased. The Court in allowing the set off observed:

"The parties here do not dispute that if the settlement was a valid compromise of the potential claims of the children, then the carrier would be entitled to set off the net amount of the settlement proceeds after deducting the expenditures for the deceased against its obligations for payment of death benefits..."

And

"Even if we assume that there was some technical deficiency in Mrs. Triste's representaton of her children in the settlement, we cannot conclude in the circumstances of this case that the carrier must be denied the setoff which the Commission awarded it. There is no suggestion that petitioner, or anyone else with an interest in this matter, wishes to undo the settlement which was made, and upon which proceeds have already been paid. This settlement was approved by the carrier on the petitioner's representation that it was a valid settlement of the family's rights. Under

ordinary principles of estoppel, a party to a settlement is not entitled to keep the benefits of it while renouncing the burdens...."

12. While apparently other jurisdictions have interpreted similar statutes differently it is felt that in the instant case, *Triste, supra,* is controlling. The defendant insurance carrier is entitled to set off the settlement proceeds against the death benefits due to the surviving spouse.

13. The defendant insurance carrier is liable for such expenses of burial of the deceased not to exceed the sum provided for in A.R.S. §23-1046 as it was in effect at the time of the subject industrial episode.

14. The applicant is entitled to such compensation benefits as provided for in A.R.S. §23-1046 A(2) as was in effect at the time of the subject industrial episode.

15. That by virtue of the settlement of the decedent's third party action, no benefits are payable until a new credit of $79,000.00 is exhausted.

A W A R D

THE APPLICANT IS HEREBY AWARDED:

1. Expenses of burial of the deceased from the defendant insurance carrier not to exceed the sum provided for in A.R.S. §23-1046 as it was in effect at the time of the subject industrial episode.

2. Such compensation benefits as provided for in A.R.S. §23-1046 A(2) as was in effect at the time of the subject industrial episode.

3. That by virtue of the settlement of the decedent's third party action, no benefits are payable until a new credit of Seventy-Nine Thousand and No/100 Dollars ($79,000.00) is exhausted.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of The Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided for by Arizona Revised Statutes, §23-942 D and §23-943 A and B (1973). Unless such written request is made within the time provided, this Award is final.

By_____
JERRY C. SCHMIDT
Administrative Law Judge

JCS:bes
DATED AND MAILED IN TUCSON, ARIZONA THIS 16TH DAY OF FEBRUARY 1983.

APPENDIX E

§23-1021. Right of employee to compensation

A. Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment, wherever the injury occurred, unless the injury was purposely self-inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as are provided by this chapter.

B. Every employee covered by insurance in the state compensation fund who is injured by accident arising out of and in the course of employment, and the dependents of every such employee who is killed, provided the injury was not purposely self-inflicted, shall be paid such compensation from the state compensation fund for loss sustained on account of the injury, shall receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as provided in this chapter.

§23-1023. Liability of third person to injured employee; election of remedies

A. If any employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety

to the employee or his dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

§23-1046. Death benefits

A. In case of an injury causing death, the compensation therefor shall be known as a death benefit, and shall be payable in the amount, for the period, and to and for the benefit of the persons following:

1. Burial expenses, not to exceed one thousand dollars, in addition to the compensation.

2. To the surviving spouse, if there is no child, thirty-five per cent of the average wage of the deceased, to be paid until such spouse's death or remarriage, with two years' compensation in one sum upon remarriage.

3. To the widow or widower, if there is a child or children, the additional amount of fifteen per cent of such wage for each child

until the age of eighteen years, the total not to exceed sixty-six and two-thirds per cent of the average wage.

4. To a single surviving child, in the case of the subsequent death of a surviving husband or wife, or if there is no surviving husband or wife, twenty-five per cent of such average wages, or if there is more than one surviving child, twenty-five per cent for one child and fifteen per cent for each additional child, to be divided among such children share and share alike, but not exceeding a total of sixty-six and two-thirds per cent of the average wage. Compensation to any such child shall cease upon death, marriage or upon reaching the age of eighteen years, except, if over eighteen years and incapable of self-support, when it becomes capable of self-support.

5. To a parent, if there is no surviving husband, wife or child under the age of eighteen years, if wholly dependent for support upon the deceased employee at the time of his death, twenty-five per cent of the average monthly wage of the deceased during dependency, with an added allowance of fifteen per cent if two dependent parents survive, and, if neither parent is wholly dependent, but one or both partly dependent, fifteen per cent divided between them share and share alike.

6. To brothers or sisters under the age of eighteen years, if there is no surviving husband or wife, dependent children under the age of eighteen years or dependent parent, the following shall govern:

(a) If one of the brothers or sisters is wholly dependent upon the deceased employee for support at the time of injury causing death, twenty-five per cent of the average monthly wage until the age of eighteen years.

(b) If more than one brother or sister is wholly dependent, thirty-five per cent of the average monthly wage at the time of injury causing death, divided among such dependents share and share alike.

(c) If none of the brothers or sisters is wholly dependent, but one or more partly dependent, fifteen per cent divided among such dependents share and share alike.

B. If the deceased employee leaves dependents only partially dependent upon his earnings for support at the time of injury, the monthly compensation shall be equal to such proportion of the monthly payments for the benefit of persons totally dependent as the amount contributed by the employee to such partial dependents bears to the average wage of the deceased at the time of the injury resulting in his death. The duration of compensation to partial dependents shall be fixed by the commission in accordance with the facts shown, and in accordance with the provisions of § 23-1047, but shall in no case exceed compensation for one hundred months.

C. A death benefit paid to an alien not residing in the United States shall be only sixty per cent of the amount specified in this section.

D. In event of death of a dependent before expiration of the time named in the award, the funeral expenses of such person, not to exceed eight hundred dollars, shall be paid.

APPENDIX F

Art. 18 § 8

Section 8. The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the Legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment peronal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer or any person employed by said employer, acting in the scope of his employment, as provided by this Constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury, except that if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such

employee may, after the injury, exercise the option to accept compensation or to retain the right to sue the person who injured him.

The percentage and amounts of compensation provided in House Bill No. 227[1] enacted by the Seventh Legislature of the Sate of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated expect by initiated or referred measure as provided by this Consitution.

APPENDIX G

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FLORENCE E. MANNEL,
Petitioner,

I CA-IC 3021

v.

ICA NO. 454-12-6153

THE INDUSTRIAL COMMISSION
OF ARIZONA,
Respondent,

CARRIER NO. 78-34366

DEPARTMENT OF
TRANSPORTATION,
Respondent Employer,

PETITION FOR REVIEW

STATE COMPENSATION FUND,
Respondent Carrier.

COMES NOW the Petitioner, by and through her counsel undersigned, and hereby petitions the Honorable Supreme Court of Arizona to review the Decision of the Honorable Court of Appeals in this matter. Said decision was filed May 17, 1984 and this Petition for Review is brought pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure and is based upon the accompanying text and appendices.

SYNOPSIS OF THE DECISION COURT OF APPEALS

The Honorable Court of Appeals was presented with the question of whether or not the recipient of widow's death benefits under the Arizona Workmen's Compensation Act is subject to the imposition of the remaining balance of the Compensation Carrier's lien which had been imposed upon the third party recovery of the widow's decedent; said recovery being a settle-

ment of the widow's dependent's claim for his injuries while he still lived.

Although the Petitioner herein was found to have been entitled to widow's benefits, she was denied the payment of the same by virtue of an approximately Seventy-Nine Thousand Dollars ($79,000.00) balance of the Carrier's lien which remained after the death of Petitioner's decedent. The Petitioner asserted, essentially, that the lien should not be applied to the widow's benefits because the statute creating the lien, A.R.S. Section 23-1023, makes reference to a lien only in the case of the employee suing for his injuries or his dependents, in the event of his death, suing for his injuries; further, Petitioner asserted that the *Triste v. Industrial Commission* case, 25 Ariz. App. 489, 544 P.2d 706 (1976), did not apply to the instant case because unlike the instant case, that case obviously involved the imposition of a lien upon a wrongful death claim asserted by children of the deceased; and, Petitioner further asserted that said statute made no reference to a lien upon death benefits and that the "such compensation" referred to in A.R.S. Section 23-1023(C) refers to the employee's compensation benefits and medical benefits, but not death benefits.

The Honorable Court of Appeals disagreed with Petitioner's positions and held that the remainder of her husband's lien should be imposed upon Petitioner's widow's compensation benefits and essentailly hald that even if it is not specifically stated in the statute,

> "death benefits should be included in the compensation benefits that the lien offsets..."
>
> The widow also argues that any ambiguity in Section 23-1023 should be resolved in her favor to achieve the remedial purpose of the Worker's Compensation Law. One purpose of Section 23-1023, however, is to reimburse the Compensation Carrier for its expenditure."

The final argument of the Petitioner herein was that to award her benefits and withhold the payment of the same under A.R.S. Section 23-1023 violated Arizona Constitution, Article 18, Sec-

tion 8. The Honorable Court of Appeals felt that such was not the case. It held that the widow's death benefits had not been reduced, even though the Carrier was not required to actually pay death benefits to the widow for another fifteen years. The Decision of the Honorable Court of Appeals is attached hereto and by this reference made a part hereof for all purposes as Appendix A.

ISSUES PRESENTED FOR REVIEW

1. Is the Award of the Industrial Commission of Arizona reasonably supported by the law and the evidence wherein it imposes a lien upon the entitlement of the Petitioner to recover widow's death benefits, based upon the residuum of the lien remaining from the deceased employee's third party settlement?
2. Has the Honorable Court of Appeals invaded the province of the legislature by extending the Compensation Carrier's lien to the widow in the instant case with no statutory basis for the same?
3. Is the *Triste* case in point with regard to the facts of the instant case; if not, is the Decision by the Honorable Court of Appeals supportable, and if so, does the *Triste* case, *supra,* represent the law of this jurisdiction?
4. Have the widow's Constitutional Right to death benefits been infringed upon by virtue of the Decision in the instant case?

MATERIAL FACTS

With regard to the primary issues before this Honorable Court, the Petitioner herein has attached as Appendices B, C and D to this Brief; the settlement documents involved in the third party law suit involving the Petitioner's decedent. Very briefly, Howard Mannel was injured in his job as an inspector for the Arizona Department of Transportation while measuring the temperature of a load of hot asphalt in the rear of a dump truck on September 21, 1978, when the driver moved the truck without notice to Mr. Mannel. Although it was initially felt that the injury was merely a strain of his shoulder, it later became apparent that Mr. Mannel had suffered a severe injury to his heart, described as a rupture of a chordae tendinae which in turn caused mitral valve

regurgitation which resulted in total disability of Mr. Mannel. This condition was eventually accepted by the Responden Carrier as a compensable injury and the decedent was awarded total disability compensation benefits. In addition to receiving his compensation benefits, a third party law suit was filed in the Pima County Superior Court against the driver and owner of the truck which lurched and caused the injury to the decedent. A settlement was eventually effectuated in the third party law suit which resulted in the dismissal of the same on or about the 28th day of July, 1981. (See Stipulation and Order attached hereto as Appendix E.)

The specific allegations set forth in the Complaint of said third party action are set forth in Appendix F which by this reference is also incorporated herein as if fully set forth.

Appendix C, referred to above, is the only document concerning the decedent's third party claim signed by the Petitioner herein.

At the Hearing on January 3, 1983 testimony was taken from Sandy Kriner, Subrogation Specialist with the State Compensation Fund, who testified that at the time of the decedent's death there was a credit in existence in the amount of approximately Seventy-Nine Thousand Dollars ($79,000.00). (TR 1/3/83, Page 3.)

REASONS WHY PETITION SHOULD BE GRANTED

There are a variety of reasons why this Honorable Court should grant the instant Petition, for brevity's sake, Petitioner will only name those reasons which are deemed the most essential. First, there is a conflict between the Decisions of the Honorable Court of Appeals in the instant case and its decision in *Talley v. Industrial Commission of Arizona,* 137 Ariz. 343, 670 P.2d 741 (App. 1983), in which it was held that the carrier's lien did not extend to a third party settlement of an employee who had an industrial low back injury on one day and a non-industrial automobile accident aggravating his low back on the next day even though the third party settlement was obviously based both upon the results of the industrial and the non-industrial injury. In that

case the Honorable Court of Appeals cited 2(A) Larson, The Law of Workmen's Compensation, Section 74.17(b) (1982) as follows:

> "It is clear that the actions settled by petitioner against the automobile driver and her insurer was not based upon the same facts supporting the compensation award. The two events were entirely unrelated, although the effects combined to create essentially one condition."

Second, there is no Arizona Supreme Court determination upon the specific issues raised by the instant case; neither *Triste, supra,* nor *Talley, supra,* were reviewed by this Honorable Court. Further the statutory construction of the Honorable Court of Appeals in the instant case appears to be substantially similar to judicial legislation. The arguments raised by Petitioner that the wording of A.R.S. Section 23-1023 refers only to: a) The employee's third party lawsuit either brought by himself or his estate; b) That "such benefits" do not include death benefits, since the employee cannot claim or obtain death benefits; c) That the lien can only be interpreted to offset the employee's benefits since, if there was an intention to have this lien applied to widows and dependents, then such should have been written into the law, were all swept aside by the Decision of the Court of Appeals based upon some overriding concern with said Court for the protection of the Carrier as opposed to the security of the widow of the employee.

Third, there appears to be a conflict between the Decisions of the Honorable Court of Appeals in *Triste, supra,* and the instant case since the *Triste* case clearly involved the settlement of the third party claim of the children of the worker which, of necessity, had to be a wrongful death claim, while the widow in the instant case did not settle a wrongful death action, but was an incidental plaintiff to the third party action entirely concerned with the injuries received by Plaintiff's decedent. The Court's suggestion that the children in *Triste, supra,* compromised "potential" wrongful death claims, is not supported by the reported decision in said case.

Another compelling reason for this Honorable Court to Grant

the relief requested herein is that the instant Decision appears to be in the minority of the well-reasoned decisions of other jurisdictions and the Honorable Court of Appeals felt compelled to ignore this fact as, "in the final analysis, however, the terms of Section 23-1023, not out of state authority, are determinative." In so ruling the Honorable Court of Appeals appears to have misconstrued the holding of *Transcontinental Insurance Company v. Walsh,* 621 S.W.2d 461 (Tex. App. 1981), which, respectfully, did not apply the lien to a third party recover by a Workmen's Compensation death beneficiary entitled to compensation, as held hereinbelow. The *Walsh* case, *supra,* dealt with a statute that is similar in effect but different in wording from our own.

Contrary to the assessment by the Honorable Court of Appeals hereinbelow, the Texas Court of Civil Appeals held that since the plaintiff was not a Worker's Compensation beneficiary entitled to benefits at the time that the third party claim was concluded, then the lien would not apply to said Plaintiff since her claim for death benefits was a separtate and distinct cause of action than that which had belonged to the injured employee during his life. The Court below agreed that widow's benefits under Worker's Compensation and a wrongful death action differ from and are totally separate remedies from the employee's claim for compensation and civil damages, yet the Court refused to apply *Walsh, supra,* et al.

In addition to the foregoing the interpretation by the Honorable Court of Appeals does not interpret A.R.S. Section 23-1023 in pari materia with A.R.S. Section 23-1046, or with the established spirit and intent of the Workmen's Compensation Act. Nor does it adopt the well-reasoned authorities of the jurisdictions of Texas, New York, New Jersey, Vermont, all of which have similar statutes to the State of Arizona. Those jurisdictions that have ruled that the lien extends to the recovery of a recipient of widow's or dependent's benefits, all have statutory provisions specifically providing for the same, e.g.: Tennessee, Minnesota, Pennsylvania, and Illinois. Yet the Arizona Court of Appeals without authority of statutory wording and without benefit of out-of-state authority has decided that the lien should extend to the recipient of death benefits 1) To protect the Carrier's lien, and 2) To

provide a fund from which the lien may be satisfied.

No true consideration was given to the fact that if it is appropriate to extend such a lien to the widow, because she is not entitled to medical benefits, but only one-thrid of the decedent's average monthly wage rather than two-thirds, she will be over seventy-five (75) years of age before she will be entitled to any payments under the Award.

It is respectfully asserted that if the out of state cases should be ignored, as the Honorable Court of Appeals held below, and if the lack of statutory language is replaced by a policy decision which is not within the wording of said statute, then we have a highly important issue of law that has been incorrectly decided and demands the attention of the Honorable Supreme Court of the State of Arizona.

Finally, an overriding question must be answered by the Honorable Supreme Court of this state, and that is whether or not the Worker's Compensation Act of this state is truly remedial in nature, and whether or not in terms of statutory interpretation, the benefit of the doubt should go to the worker and his dependents, as opposed to the insurance carrier. The importance of the issues raised herein is staggering when one considers that the compensation insurance carrier herein has been repaid totally for any benefits which it paid to the employee, that the widow has been unpaid and will remain so for the next fifteen years, and that there is absolutely nothing in A.R.S. Section 23-1023 which specifically imposes a lien upon the recovery of widow's and dependent's benefits by virtue of any third party claim. If the Decision in the instant case is permitted to stand it can be logically extended to cover the situation where the worker who is not married at the time of his third party settlement, subsequently marries and dies as a result of the industrial injury leaving a substantial unused credit on the carrier's lien. Even though the widow in such a hypothetical case had no direct or indirect interest in the third party lawsuit settled by her deceased husband, the Decision in the instant case would deprive said widow of her benefits as the fund created by the third party settlement was the only fund available from which said lien could be satisfied. The foregoing hypothetical could also be extended to children who

are not born at the time of the third party settlement, or children who were in existence at the time of the third party settlement, but were not dependent upon the worker at the time and received no financial reward from said settlement; and yet would have a compensable wrongful death action against the third party tort feasor and, conceivably, a dependent's claim if they were dependent at the time of the worker's death. One final hypothetical factual situation should convince this Honorable Court to take review herein and that would be the case where both the husband and wife were involved in a third party accident wherein both were inured arising out of and in the course of their employments. If the husband in such a situation received a substantially greater third party recovery than the wife, would the wife, upon the death of the husband, be entitled to the payment of widow's benefits, even though she recovered for her own injuries in the third party lawsuit?

The foregoing scenarios are all conceivable, and point out the great need for the Arizona Supreme Court to clarify an extremely complex and confusing area of the law. The Honorable Court of Appeals has seen fit to disregard the holdings of other jurisdictions with similar statutes, and to infer meaning into the statute which contains no language supportive of said inference.

CONCLUSION

Petitioner has established an entitlement to widow's benefits, but the Arizona Industrial Commission and the Honorable Court of Appeals have seen fit to deprive her of the payment of the same until she reaches age seventy-five because she happened to be married to the deceased employee when a third party claim for his injuries was settled far beyond the amount of benefits payable under his claim. It is respectfully asserted that in denying the widow the payment of benefits in this case, the Honorable Court of Appeals' Decision conflicts with two of its prior decisions, with the majority of the better reasoned cases in this country, and with the Constitutional Right of the widow to the payment of death benefits.

It is the hope of the Petitioner herein that the Honorable

Supreme Court of the State of Arizona will agree that the questions presented herein are important issues of law that have thus far not been correctly decided and have not been the subject of a Supreme Court ruling.

WHEREFORE, Petitioner respectfully prays that this Honorable Court review the Decision of the Court of Appeals, vacate the same, and set aside the Awards of the Industrial Commission of Arizona as being not reasonably supported by the law or the evidence; further, that this Honorable Court grant Petitioner her costs herein lawfully and necessarily incurred and, such other and further relief not herein previously enumerated, as to this Honorable Court shall appear proper in the premises.

RESPECTFULLY SUBMITTED this 31st day of May, 1984.

RABINOVITZ, DIX & REHLING, P.C.

By

Bernard I. Rabinovitz
Attorneys for Petitioner

Copy of the foregoing mailed
this 31st day of May, 1984, to:

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APPENDIX H

IN THE SUPREME COURT
STATE OF ARIZONA

FLORENCE E. MANNEL,
Petitioner,

v.

THE INDUSTRIAL COMMISSION
OF ARIZONA,
Respondent,

DEPARTMENT OF TRANSPORTATION,
Respondent Employer,

STATE COMPENSATION FUND,
Respondent Carrier.

Supreme Court No. 17621-PR
Court of Appeals No. 1CA-IC 3021
ICA, No. 454-12-6153

MOTION FOR PERMISSION TO FILE
MOTION FOR RECONSIDERATION

COMES NOW, the Petitioner, by and through her attorney undersigned and hereby respectfully prays the Arizona Supreme Court for permission to file a Motion for Reconsideration upon the grounds and for the reasons set forth in the Memorandum attached hereto and by the reference made a part hereof for all purposes.

MEMORANDUM

It is respectfully asserted that the issues presented in the Petition for Review which this Honorable Court had under consideration from on or about June 1, 1984 through and including the denial of the review on September 13, 1984 were substantial issues

of law involving the constitutional rights of widows who are applicants for worker's compensation benefits in the State of Arizona. The essential issue that this Honorable Court has failed to consider is whether or not widows in the State of Arizona are entitled equal protection of the laws whereby the insurance carrier in a workman's compensation claim is not required to pay widow's benefits until the uncredited amount of the decedent's third party recovery is applied to any entitlement of the widow to benefits subsequent to the death of the injured worker. It was also previously pointed out that the Supreme Court has not ruled upon this area as yet and there is an apparent conflict in the decisions of the Court of Appeals between *Triste v. Industrial Commission,* 25 Ariz. App. 498, 544 P.2d 706 (1976) and *Talley v. Industrial Commission,* 137 Ariz. 343, 670 P.2d 741 (App. 1983).

It is also abundantly clear that the holding of the Court of Appeals herein is against the better reasoned cases on the subject across the country and is contrary to the provisions of A.R.S. §23-1023 which makes no provision for imposing a lien upon the recovery of a widow or dependent of a deceased worker. The opinion of the Court of Appeals also conflicts with the provision of A.R.S. §23-1046 which requires the payment of a death benefit to a widow upon a showing of a causally related death as well as Article 18, §8 of the Arizona Constitution which requires legislation that "shall be required to be paid to any such workman in case of his injury and to his dependents, as defined by law, in case of his death..."

The respondents herein filed a request to extend the period of time to respond to the Petition for Review herein, and did file an extensive opposition indicative of the importance of the issues raised herein.

The notice from this Honorable Court dated September 14, 1984 denying said Petition made no reference to those Justices involved in the process or in the decision to deny review.

With the large number of cases that are presented to this Honorable Court upon the Petition for Review, the undersigned feels that is may be possible that this Honorable Court may have missed the significance of this matter and in fairness to the petitioner and to those whom may come subsequent before the

bar with the same problem, Petitioner respectfully prays this Honorable Court to grant permission to file a Motion for Reconsideration so that this Honorable court may consider a matter of substantial importance to widows and dependents of workers who die as a result of an on-the-job injuries.

It is therefore with the utmost respect that the undersigned petitions this Honorable Court for permission to file a Motion for Reconsideration on the premise that the Petition for Review was apparently not sufficiently drawn to have attracted the attention of this Honorable Court to the importance and significance of the issues raised by the instant case.

WHEREFORE, Petitioner respectfully prays this Honorable Court for permission to file a Motion for Reconsideration.

RESPECTFULLY SUBMITTED this 1st day of October, 1984.

RABINOVITZ, DIX & REHLING, P.C.

By
Bernard I. Rabinovitz
Attorney for Petitioner

COPY mailed this 1st day
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